HARNESSING THE PRIVATE ATTORNEY GENERAL: EVIDENCE FROM QUI TAM LITIGATION

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What role do expertise and specialization play in regulatory regimes that deploy private litigation as an enforcement tool? This question is of enormous practical importance to the optimal design of law enforcement across a range of regulatory areas, from securities and antitrust to environmental protection and civil rights. Yet it has generated surprisingly little rigorous empirical analysis. This Article begins to fill that gap by offering the first large-scale empirical study of a growing and increasingly controversial litigation regime in which debate about the role of specialized private enforcers has taken center stage: qui tam lawsuits brought under the False Claims Act (FCA). Using an original data set of more than 4,000 qui tam suits filed between 1986 and 2011, this Article tests, and mostly rejects, a pair of what might be called "supply-side" critiques of the regime: first, that qui tam litigation is inefficiently dominated by a growing cadre of repeat, "professional" plaintiff-relators and second, that qui tam's explosive growth and seeming excesses can be attributed to an increasingly specialized qui tam plaintiffs' bar. The findings demonstrate that, contrary to a chorus of critics, specialized relator-side firms appear to play a positive role in the system, enjoying higher litigation success rates and surfacing larger frauds than less experienced firms. Similarly, while repeat relators win less often than one-shotters, they offset lower win rates by obtaining substantially larger recoveries when they succeed. These findings offer a much-needed empirical base-line for evaluating legal and policy debate around the FCA as well as leading proposals for its reform. More broadly, exploring the role of expertise and specialization in a specific, microinstitutional context such as qui tam is a first step to developing a thicker and more systematic account of the possibilities and limits of private enforcement of public law.

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INTRODUCTION

Few areas of litigation have generated more heated debate in recent years than lawsuits brought pursuant to the qui tam provisions of the False Claims Act (FCA).[1] Those provisions empower private persons, dubbed "relators," to sue private parties on behalf of the United States for fraud in connection with federal programs or expenditures and earn a cash "bounty" equal to a portion of any money returned to the federal fisc. Qui tam's champions point to its rapid growth and "spectacular results"—some seven thousand cases since 1986 with judgments now approaching three billion dollars annually, easily rivaling and even eclipsing securities and antitrust litigation[2]—as evidence of massive corporate fraud committed against the United States and, in turn, the

1. 31 U.S.C. § 3729–3733 (2006). As noted in more detail in Part II, the FCA's qui tam provisions have generated a huge volume of commentary. For instance, a simple Lexis search returned more than sixty articles focused on qui tam litigation in *The New York Times*, *The Washington Post*, and *The Wall Street Journal* in the past two years alone. Qui tam litigation has also generated a large and growing law review literature. For a sampling of key contributions, see sources cited infra note 107. Cases interpreting the FCA's qui tam provisions have also regularly reached the Supreme Court, including four cases in the Court's last five terms. See Allison Engine Co. v. United States ex rel. Sanders, 553 U.S. 662, 670 (2008) (holding, inter alia, FCA requires that defendant intend that government pay false claim, thus limiting circumstances under which relators can assert colorable claims); cases cited infra notes 16–17. Finally, qui tam litigation has recently seized the popular imagination, even giving rise to a book genre focused on the triumphs and travails of "whistleblowers." E.g., Paul Grauber, At What Cost? A Whistleblower's Story (2010); Stephen Klaidman, Coronary: A True Story of Medicine Gone Awry (2007); Peter Rost, The Whistleblower: Confessions of a Healthcare Hitman (2006); Henry Scammell, Giantkillers: The Team and the Law that Help Whistle-blowers Recover America's Stolen Billions (2004); John W. Schilling, Undercover: How I Went from Company Man to FBI Spy—and Exposed the Worst Healthcare Fraud in U.S. History (2008).

2. For the most up-to-date aggregated statistics on qui tam filings and impositions, see Civil Div., U.S. Dep't of Justice, Fraud Statistics—Overview October 1, 1987–September 30, 2011 (Dec. 7, 2011), http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf (on file with the *Columbia Law Review*) [hereinafter Fraud Statistics] (reporting $2.4 billion in qui tam impositions in 2010 and $2.8 billion in 2011, with average of 600 new filings across two years); see also Press Release, Dep't of Justice, Department of Justice Recovers $3 Billion in False Claims Cases in Fiscal Year 2011 (Dec. 19, 2011), http://www.justice.gov/opa/pr/2011/December/11-civ-1665.html (on file with the *Columbia Law Review*) [hereinafter Ryan & Simmons, 2011 Review] (noting historic $2.8 billion recovered in suits filed under qui tam provisions in 2011). For securities litigation statistics, see Ellen M. Ryan & Laura E. Simmons, Cornerstone Research, Securities Class Action Settlements: 2011 Review and Analysis (2012), available at http://securities.stanford.edu/Settlements/REVIEW_1995-2011/Settlements_Through_12_2011.pdf (on file with the *Columbia Law Review*) (reporting $3.2 billion in securities class action settlements in 2010 and $1.4 billion in 2011, with average of six hundred new filings in both years). For antitrust filing statistics, see Hindelang Criminal Justice Research Ctr., State Univ. of N.Y. at Albany, Sourcebook of Criminal Justice Statistics Online tbl.5.41.2010 (2010), http://www.albany.edu/sourcebook/pdf/t5412010.pdf (on file with the *Columbia Law Review*) (reporting average of roughly 650 private antitrust lawsuits in 2009 and 2010).

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need for a robust private enforcement role.[3] Many of these same voices also contend that deputizing "private attorneys general" to police fraud on the government is the only way to combat "cozy relationships" between government agencies and industry.[4] Critics, by contrast, paint qui tam as a litigation regime run amok. In an avalanche of Supreme Court amicus filings, congressional testimony, and articles in the popular and academic press, the regime's detractors warn that qui tam litigation has become a "cottage industry,"a "legal gold rush," and a "great American giveaway" to an undeserving alliance of "bounty-seeking" and increasingly "professional" relators and an ever more specialized qui tam plaintiffs' bar.[5]

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3. See, e.g., James B. Helmer, Jr., How Great Is Thy Bounty: Relator's Share Calculations Pursuant to the False Claims Act, 68 U. Cin. L. Rev. 737, 744, 759–61 (2000) (touting FCA's "spectacular results" and recommending that courts more frequently award "attractive relator's shares" to incentivize more whistleblowing); Barton H. Thompson, Jr., The Continuing Innovation of Citizen Enforcement, 2000 U. Ill. L. Rev. 185, 233 (surveying qui tam enforcement landscape and suggesting "initial verdict" is it has been successful, justifying its expansion to environmental protection). For a further sampling of the law review literature expressing strong support for the qui tam regime, see, e.g., Pamela H. Bucy, Private Justice, 76 S. Cal. L. Rev. 1, 53 (2002) [hereinafter Bucy, Private Justice] (claiming FCA's qui tam regime has been "extraordinarily successful as a regulatory tool"); Barry M. Landy, Note, Deterring Fraud To Increase Public Confidence: Why Congress Should Allow Government Employees To File Qui Tam Lawsuits, 94 Minn. L. Rev. 1239, 1264–68 (2010) (touting success of qui tam enforcement and urging Congress to amend FCA to explicitly grant public employees standing to serve as relators); Jill E. Fisch, Class Action Reform, Qui Tam, and the Role of the Plaintiff, 60 Law & Contemp. Probs., Autumn 1997, at 167, 198–202 (touting qui tam's success and advocating export of qui tam mechanism to other regulatory contexts, including securities and antitrust).

4. See, e.g., Charles E. Grassley, Op-Ed., Abe Lincoln vs. the Justice Department, N.Y. Times, Jan. 16, 1993, at L21 (stating "the Justice Department has been consistently hostile to whistleblowers" and observing "perhaps the executive branch dislikes citizens interfering in the cozy relationships it has with defense companies and other public contractors"); see also J. Randy Beck, The False Claims Act and the English Eradication of Qui Tam Legislation, 78 N.C. L. Rev. 539, 563–65 (2000) (recounting that some members of Congress believed DOJ was "'on the side of the defense contractors'" for political reasons and qui tam model would work "as a corrective measure for the Justice Department's unwillingness to enforce the law" (quoting False Claims Reform Act: Hearings Before the Subcomm. on Admin. Practice and Procedure of the S. Comm. on the Judiciary, 99th Cong. 15 (1985) (statement of Sen. Howard Metzenbaum))). On the term "private attorney general" and its use in contemporary legal discourse, see generally William B. Rubenstein, On What a "Private Attorney General" Is—and Why It Matters, 57 Vand. L. Rev. 2129 (2004) (describing origins of term "private attorney general" and offering conceptual taxonomy).

5. For the direct quotes, see, respectively, Brief for Chamber of Commerce of the United States of America as Amicus Curiae Supporting Petitioner at 3, Schindler Elevator Corp. v. United States ex rel. Kirk, 131 S. Ct. 1885 (2011) (No. 10-188), 2010 WL 3452203, at *3 [hereinafter Schindler Brief] ("The FCA's relaxed intent standard, harsh treble and per-claim damages specifications, and fee-shifting provision have combined to produce an expansive cottage industry of bounty-seeking relators."); Michael K. Loucks, Rewarding the Whistleblowers Under the False Claims Act: The Great American Giveaway, 15

At one level, the debate over qui tam can be dismissed as rhetorical posturing about litigation that has become all too common in American law and politics.[6] At a deeper level, however, the debate raises critical questions about the use of private enforcement as a regulatory tool that extend well beyond the FCA, to areas as diverse as employment discrimination, environmental, antitrust, securities, and patent law. One set of questions concerns the identity, motives, and means of private enforcers. Who among the pool of possible enforcers should be empowered to sue to vindicate public interests? And relatedly, how important are enforcer traits, such as expertise or specialization, to the efficient functioning of private enforcement regimes? Another set of questions concerns manipulability. Just how responsive is private enforcement to efforts to channel or constrain it? And, once the floodgates are open, to what extent can legislators or public enforcement agencies shape, whether for good or ill, the volume and character of private enforcement efforts or the capacities of private enforcers themselves? These are basic and essential questions in any effort to design an optimal system of law enforcement. We cannot evaluate competing reform proposals—or, indeed, the choice of private litigation over regulatory alternatives in the first place—without answering them. Yet, across a range of litigation regimes, there is strikingly little empirical evidence that can guide policymaking efforts.

Healthcare Fraud Rep. (BNA) No. 2, at 102, 103 (Jan. 26, 2011) ("A whistleblower who seeks advice from private counsel who himself stands to gain from the False Claims Act litigation by sharing in the recovery will most likely be advised not to report the matter to corporate compliance."); Editorial, False Claims Gold Rush, Wall St. J., May 2, 2008, at A14 ("Welcome to the legal gold rush occurring under the cover of 'reforming' the False Claims Act."); Amy Kolz, The Professional, Am. Law., June 1, 2010, at 28, 28 (describing efforts of "professional" and "serial whistleblower" who has filed multiple qui tam lawsuits). For broader criticisms of the qui tam regime, see, e.g., Beck, supra note 4, at 549 (noting qui tam bounties are so large they incentivize prospective plaintiffs to "pursue personal pecuniary gain at the expense of the common good"); William E. Kovacic, Whistleblower Bounty Lawsuits as Monitoring Devices in Government Contracting, 29 Loy. L.A. L. Rev. 1799, 1855 (1996) [hereinafter Kovacic, Whistleblower Bounty Lawsuits] ("[T]he qui tam mechanism provides inadequate disincentives for relators to file meritless suits."); Joan H. Krause, "Promises to Keep": Healthcare Providers and the Civil False Claims Act, 23 Cardozo L. Rev. 1363, 1383 (2002) (suggesting "meritless" lawsuits are to blame for increase in volume of qui tam litigation); Dayna Bowen Matthew, The Moral Hazard Problem with Privatization of Public Enforcement: The Case of Pharmaceutical Fraud, 40 U. Mich. J.L. Reform 281, 284–85 (2007) [hereinafter Matthew, Moral Hazard] (noting "fundamental divergence between private and public incentives in FCA prosecutions" and arguing "FCA claims increasingly attract plaintiffs with questionable motives who advance and inadvertently make bad law, which supplants the reasoned regulatory regime that should govern Government contractors' conduct"); Michael Rich, Prosecutorial Indiscretion: Encouraging the Department of Justice To Rein in Out-of-Control Qui Tam Litigation Under the False Claims Act, 76 U. Cin. L. Rev. 1233, 1238 (2008) ("[T]he FCA encourages the government too often to stand by and allow relators to exercise nearly complete prosecutorial discretion in their qui tam actions.").

6. See generally Thomas F. Burke, Lawyers, Lawsuits, and Legal Rights: The Battle over Litigation in American Society (2002) (critically assessing politics of litigation in contemporary United States).

This Article begins to fill that gap by offering some initial findings from the first large-scale empirical study of the qui tam regime since the modern FCA came into being in 1986.[7] Using an original data set encompassing more than four thousand unsealed qui tam lawsuits filed between 1986 and 2011—from the most routine and least visible cases to the blockbuster, nine-figure settlements that have become a fixture of recent media coverage—the analysis provides a vivid portrait of qui tam litigation that goes well beyond existing, and mostly anecdotal, accounts.[8]

This Article focuses on the role of expertise and specialization among qui tam enforcers and, in particular, a pair of what may be called "supply-side" critiques of the regime. The first critique is that qui tam's rise has been fueled by a growing cadre of repeat, "professional" relator-plaintiffs who bring serial qui tam suits, not as classic whistleblowers using "inside" information acquired firsthand within a company, but rather based on outside investigation into publicly available materials that are sometimes obtained from the government itself.[9] The second critique is that qui tam litigation is too lawyer-driven. On this view, qui tam's rapid growth and seeming excesses can be attributed to an increasingly specialized qui tam plaintiffs' bar that "speculates" in litigation, exploits regulatory gray areas rather than surfacing clear and uncontroversial forms of fraud, and brings "parasitic" enforcement efforts that inefficiently piggyback on government enforcement initiatives.[10]

This Article's core findings offer an empirical baseline against which to measure both critiques and cast serious doubt on the more tendentious versions of each. Contrary to a chorus of critics, specialized relator-side firms appear to play a positive role in the system, enjoying higher litigation success rates and surfacing larger frauds compared to less experienced firms.[11] Thus, in terms set forth in Marc Galanter's classic typology of the social organization of litigation, relatively more expert and specialized "repeat" counsel outperform their less experienced, "one-shotter" brethren.[12] For this reason, it is hard to conclude that specialization within lawyer ranks is what most ails the system. The story for repeat relators—meaning the plaintiffs themselves—is more complicated, but the conclusion is largely the same. Repeat relators win less often than

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7. As noted below, Congress substantially amended and revived the FCA in 1986 after a long period of desuetude. See infra notes 89–106 and accompanying text.

8. For an account of the few existing studies of the qui tam regime, see infra note 83.

9. See infra notes 124–131 and accompanying text (discussing critique of professional relator-plaintiffs).

10. See infra notes 133–146 and accompanying text (discussing impact of relators' bar and critique that qui tam litigation is too lawyer-driven).

11. See infra Part III.B.2, B.4 (conducting analyses demonstrating increased success of specialized relator-side firms).

12. Marc Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 Law & Soc'y Rev. 95, 97 (1974).

one-shotters, but they offset lower win rates by obtaining substantially larger sums ("impositions"[13]) when they succeed.[14] Critics of "professional" relators, it seems, have it mostly wrong.

These findings contribute to two concrete debates about how, if at all, to amend the FCA.[15] The first of these debates, which has occupied Congress, courts, and commentators, is whether qui tam enforcement efforts should be limited to classic whistleblowing insiders with firsthand knowledge of fraud, or whether enforcement should also be open to roving, outsider enforcers who develop fraud cases by other means. In its 2007 decision in *Rockwell International v. United States*, the Supreme Court adopted a narrow view of this issue, strictly construing the FCA's requirement that relators possess "insider" information.[16] More recently, in *Schindler Elevator v. United States ex rel. Kirk*, the Court further narrowed the pool of potential relators by restricting the types of information relators can use, interpreting the FCA to bar suit where a relator acquires the information underlying a fraud claim from a Freedom of Information Act (FOIA) request served on a federal agency.[17] Congress, by contrast, has taken a broader view on such questions, amending the FCA to divest defendants of the ability to challenge an outsider relator's standing altogether and lodging that authority in the Department of Justice (DOJ)

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13. The term "imposition" is used throughout to denote a monetary award achieved through the FCA. Note, however, that an imposition is not the same as a "recovery," since at least some qui tam defendants are unable to pay out the full amount of an imposition because of bankruptcy or other limitations.

14. See infra Part III.B.1, B.4 (conducting analyses demonstrating success rates of repeat relators compared to one-shotters).

15. While this Article limits its discussion to the federal False Claims Act, it is important to note that contemporary debate extends to state-level false claims acts as well, which proliferated both before and after Congress inserted financial inducements for their enactment into the Deficit Reduction Act of 2005. See 42 U.S.C. §§ 1396, 1396a (2006) (requiring state plans for medical assistance to condition payments on their provision of False Claims Act information, procedures, and policies to employees and contractors); see also James F. Barger, Jr. et al., States, Statutes, and Fraud: An Empirical Study of Emerging State False Claims Acts, 80 Tul. L. Rev. 465, 478–80 (2005) (charting rise of state-level laws).

16. See Rockwell Int'l Corp. v. United States, 549 U.S. 457, 471, 475–76 (2007) (holding qui tam relator must, to satisfy FCA's "original source" requirement, possess sufficient firsthand knowledge of information underlying fraud claim at time of filing complaint).

17. Schindler Elevator Corp. v. United States ex rel. Kirk, 131 S. Ct. 1885, 1893 (2011) (holding data acquired by relator via FOIA requests constitute "reports" within meaning of FCA and thus fall within FCA's public disclosure provision, jurisdictionally barring relator from asserting claims using such information); see also Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson, 130 S. Ct. 1396, 1406, 1411 (2010) (holding, inter alia, FCA's public disclosure bar applies to state, as well as federal, administrative reports).

instead.[18] Both views raise basic empirical questions about the contribution different qui tam relator "types" make to the regime. The finding that repeat relators—who are almost by definition outsiders—are no less and perhaps more effective than one-shotters at returning funds to the federal treasury calls into question the policy wisdom of the Court's position in *Schindler Elevator* and elsewhere, and points in favor of less searching DOJ scrutiny of relators' insider-outsider status.

The second concrete debate concerns mounting calls to cap relator awards.[19] Here, the finding that more experienced and specialized relator-side firms outperform their less experienced counterparts suggests that policymakers should exercise caution when considering caps. As detailed below, standard economic models predict that caps will reduce the overall level of specialization among relator counsel by redistributing cases from more experienced to less experienced firms or driving more specialized firms out of the qui tam space altogether.[20] If many or most relators are still able to find counsel, the overall quality of qui tam enforcement could decrease without an appreciable reduction in filing quality.[21] Thus, while recent debate has tended to focus on the effect of caps on relators' willingness to surface information about fraud, the findings presented herein suggest that policymakers should likewise consider the effect of caps on the structure of the organized relators' bar.

Finally, this Article seeks to open up new theoretical avenues by offering a more systematic view of the institutional design challenges facing legislators who deploy private litigation as a regulatory tool. For instance, the analysis uncovers highly suggestive evidence that certain repeat players—namely former DOJ prosecutors turned private sector relator counsel—are far more likely to persuade the DOJ to exercise its powerful authority under the FCA to intervene in qui tam cases and push them to resolution.[22] However, former DOJ lawyers also achieve substan-

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18. Congress recently weighed in on this issue as part of the Patient Protection and Affordable Care Act, removing the ability of defendants in qui tam actions to invoke the "public disclosure" bar to challenge a relator's statutory standing and lodging that authority instead with the DOJ. See 31 U.S.C. § 3730(e)(4)(A) (Supp. IV 2011) ("The court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions alleged in the action or claim were publicly disclosed."). Prior to the amendments, qui tam defendants frequently used the public disclosure bar as a defense to a plaintiff's claims and grounds for dismissal of the same. In the FCA's current form, the government essentially has the final word on whether a court may dismiss a case based on a public disclosure.

19. See infra notes 150, 210–214 and accompanying text (discussing growing legislative proposals to cap relator awards and their implications).

20. See infra Part IV (discussing effect of award caps and concluding caps will redistribute qui tam suits from more experienced and more skilled firms to less experienced and less skilled firms).

21. See infra Part IV (discussing possible implications of award caps).

22. See infra Part III.B.3–4. On the seeming power of DOJ intervention, see David Freeman Engstrom, Public Regulation of Private Enforcement: Empirical Analysis of DOJ

tially lower impositions than their nonformer DOJ counterparts.[23] These findings raise provocative questions about whether the FCA's public-private hybrid structure facilitates clientelism or even "revolving door" capture between public prosecutors and specialized qui tam enforcers. This is concerning because it is these more sophisticated, specialized enforcers who might be thought to be best equipped to serve, as many champions of private enforcement hope, an agency-forcing or anticapture role.[24] The analysis thus brings into clearer focus the complicated tradeoffs involved in designing private enforcement regimes, including the difficulty of inducing private enforcers, particularly plaintiffs' counsel, to invest in regime-specific expertise and an infrastructure for finding and retaining clients without also incentivizing wasteful and excessive enforcement effort or facilitating clientelism and capture. Exploring the role of specialization and expertise in a specific, microinstitutional context such as qui tam is thus a first step to developing a thicker and more systematic account of the possibilities and limits of private enforcement of public law.[25]

The remainder of this Article proceeds in four Parts. Part I surveys existing theory and evidence on the design of private enforcement regimes, with particular focus on the role of enforcer expertise and specialization in such regimes. Part II provides an overview of the FCA, situates the qui tam mechanism in the context of broader theoretical debates about private enforcement, and highlights a range of anecdotal claims made about the regime's basic workings. Part III sets out empirical findings on qui tam litigation between 1986 and 2011, focusing on the role of expertise and specialization among relators and relator counsel. Part IV steps back and examines the implications of the empirical findings for proposals to amend the FCA and places these implications in the

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Oversight of Qui Tam Litigation Under the False Claims Act, 107 Nw. U. L. Rev. (forthcoming 2013) (manuscript at 24) [hereinafter Engstrom, Public Regulation of Private Enforcement] (on file with the *Columbia Law Review*) (finding 90% of intervened cases achieve imposition, while 90% of declined cases do not).

23. See infra Part III.B.3–4 (discussing differences in intervention and imposition results between former DOJ lawyers and non-former DOJ lawyers).

24. See Sean Farhang, The Litigation State: Public Regulation and Private Lawsuits in the United States 20 (2010) [hereinafter Farhang, Litigation State] ("Lawsuits provide a form of auto-pilot enforcement that will be difficult for bureaucrats or future legislative coalitions to subvert, short of passing a new law."); Matthew C. Stephenson, Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies, 91 Va. L. Rev. 93, 110 (2005) ("[A] potential benefit of private enforcement suits is that they can correct for agency slack—that is, the tendency of government regulators to underenforce certain statutory requirements because of political pressure, lobbying by regulated entities, or the laziness or self-interest of the regulators themselves.").

25. See Edward L. Rubin, The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions, 109 Harv. L. Rev. 1393, 1437 (1996) (explaining need for microinstitutional analysis as way to drive theoretical development).

context of broader scholarly debate about the optimal design of law enforcement.

I. HARNESSING THE PRIVATE ATTORNEY GENERAL: THEORY AND EVIDENCE

A. *Optimizing Private Enforcement: Two Types of Harnessing*

When government seeks to control undesirable behavior, it must choose between regulation via administrative enforcement, regulation via private litigation in courts, or a mix of both.[26] When government chooses to regulate via private litigation, the challenge is to harness private enforcers in two distinct senses. First, the regime must mobilize the resources and talents of private enforcers, including plaintiffs and their counsel, by incentivizing them to litigate in the first place. This is harnessing in the sense of *leveraging*. At the same time, the regime must harness private enforcers in a very different way, by limiting overzealous or otherwise socially undesirable enforcement efforts. This is harnessing in the sense of *constraining*.[27]

To a large extent, the mere creation of a private right of action with a damages remedy, attorney fee shifts, or a combination of the two, will be sufficient to achieve harnessing as leveraging. Microeconomic theories of litigation tell us that private enforcers will act whenever the expected value of doing so exceeds the expected cost.[28] It follows that increasing fines, damages, or fees—i.e., the "bounty" that would-be enforcers and their counsel can expect to receive—will induce greater levels of enforcement effort.[29]

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26. Sean Farhang, Public Regulation and Private Lawsuits in the American Separation of Powers System, 52 Am. J. Pol. Sci. 821, 823 (2008).

27. See, e.g., Farhang, Litigation State, supra note 24, at 21–31 (summarizing "legislative instruments of legal mobilization" through which legislature can incentivize greater or lesser litigation behavior by altering expected benefits and costs of filing suit); Richard A. Nagareda, The Litigation-Arbitration Dichotomy Meets the Class Action, 86 Notre Dame L. Rev. 1069, 1080 (2011) (noting goal of legislative frameworks regarding private enforcement is to "incentiviz[e] claiming, but without thereby creating a litigation bonanza").

28. See Farhang, Litigation State, supra note 24, at 22 (reviewing standard law and economics theory of litigation calculus).

29. A growing body of empirical evidence suggests that private enforcers are surprisingly sensitive to simple economic incentives. See, e.g., Sean Farhang, Congressional Mobilization of Private Litigants: Evidence from the Civil Rights Act of 1991, 6 J. Empirical Legal Stud. 1, 11–12, 17 (2009) [hereinafter Farhang, Mobilization] (finding increase in Title VII case filings following enactment of the Civil Rights Act of 1991, which made available some punitive damages); Sean Farhang & Douglas Spencer, Economic Recovery Rules and Attorney Representation in Job Discrimination Litigation 10–11 (2012) (unpublished manuscript), available at http://ssrn.com/abstract=1882245 (on file with the *Columbia Law Review*) (finding increase in represented plaintiffs after Civil Rights Act of 1991 made available limited punitive damages); see also Stephen J. Choi, Do the Merits Matter Less After the Private Securities Litigation Reform Act?, 23 J.L. Econ. &

Achieving harnessing as constraint is more difficult. Profit-driven enforcers will act whenever it pays to do so, even where the *social* cost of enforcement—e.g., the transaction costs incurred, including judicial resources consumed, or the economic and social costs imposed on affected communities—exceeds any benefit.[30] Put another way, private enforcers do not exercise prosecutorial discretion. In addition, indifference to social cost may lead profit-motivated private enforcers to initiate so-called *in terrorem* lawsuits, using the threat of massive discovery costs or bad publicity to extract settlements when the social cost of adjudication would exceed any possible benefit or, worse, where culpability is entirely absent.[31] Wasteful overdeterrence and unnecessary expenditure of social resources are the result.

Given the difficulty of adequately constraining private enforcers, how might a regulatory designer optimize private enforcement efforts? One approach involves curtailing remedies or erecting procedural barriers in ways that directly shape litigant incentives and thus achieve a desired level of enforcement activity. State-level tort reform efforts showcase the possibilities: damages caps, modification of joint and several liability rules, shortened statutes of limitations and repose, restrictions on the class action device, stiffened sanctions under state-equivalents of Rule 11, limits on discovery, reverse fee shifts (or "loser pays" rules), and

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Org. 598, 622–23 (2007) [hereinafter Choi, Merits] (finding decrease in lower-value suits in response to procedural costs of Private Securities Litigation Reform Act (PSLRA)). This is not to suggest that net present value alone determines enforcement levels. A long literature in social science and empirical legal studies suggests that multiple factors, including bounded rationality, noneconomic litigant motives, media distortion, and broadscale sociocultural forces, affect the decision to litigate. See Farhang, Mobilization, supra, at 7–8. Moreover, where private enforcers are authorized to seek only injunctive relief rather than damages, fee shifts alone—or other, more indirect means of incentivizing private enforcement efforts, such as tax exemptions for nonprofit public interest groups—may prove less effective. See, e.g., Margaret H. Lemos, Special Incentives to Sue, 95 Minn. L. Rev. 782, 809 (2010) (reviewing empirical studies and concluding damages enhancements may be relatively more effective at mobilizing private enforcers than fee shifts).

30. See Steven Shavell, The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System, 26 J. Legal Stud. 575, 579 (1997) ("[P]rivate parties are primarily concerned with their selfish benefits from litigation."); see also Stephenson, supra note 24, at 115 ("[P]rivate parties may be less sensitive than government agencies to the economic and social costs of particular enforcement actions, such as the disruptive impact on affected communities . . . .").

31. See Lucian Arye Bebchuk, Suing Solely to Extract a Settlement Offer, 17 J. Legal Stud. 437, 441–48 (1988) (modeling incentive structures and informational challenges that yield frivolous lawsuits); Avery Katz, The Effect of Frivolous Lawsuits on the Settlement of Litigation, 10 Int'l Rev. L. & Econ. 3, 6–16 (1990) (same); see also John H. Beisner, Discovering a Better Way: The Need for Effective Civil Litigation Reform, 60 Duke L.J. 547, 549 (2010) ("Plaintiffs' attorneys routinely burden defendants with costly discovery requests and engage in open-ended 'fishing expeditions' in the hope of coercing a quick settlement. As a result, discovery frequently becomes the focus of litigation, rather than a mere step in the adjudication process.").

heightened pleading and substantive liability standards.[32] Similar reforms and reform ideas have surfaced at the federal level as well.[33] Another option is to vest judges with greater power to manage litigation or dismiss socially costly cases via dispositive motions before substantial litigation has begun. Examples include the steady expansion of judges' managerial power over discovery under Federal Rule of Civil Procedure 26 and the Supreme Court's recent and controversial decisions in *Twombly*[34] and *Iqbal*[35] authorizing trial judges to impose a more exacting pleading standard for all claims.[36]

But these approaches are hardly a panacea. Judges may lack the ability to gauge a litigation regime's aggregate social welfare effects, particularly when adjudicating atomized and mostly binary disputes.[37] Many

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32. See generally F. Patrick Hubbard, The Nature and Impact of the "Tort Reform" Movement, 35 Hofstra L. Rev. 437, 485–524 (2006) (surveying federal and state tort reforms); Abigail R. Moncrieff, Federalization Snowballs: The Need for National Action in Medical Malpractice Reform, 109 Colum. L. Rev. 844, 855–61 (2009) (reviewing literature on medical malpractice reform); Ronen Avraham, Database of State Tort Law Reforms (Univ. of Tex. Sch. of Law, Law & Econ. Research Paper Series, Paper No. 184, 2011), available at http://ssrn.com/abstract=902711 (on file with the *Columbia Law Review*) (cataloguing state tort reforms).

33. As an example, the PSLRA responded to concern about securities "strike" suits—in which securities plaintiffs file suit upon any large drop in stock price in the hopes of uncovering evidence of fraud—by, among other things, giving courts discretion in determining adequate plaintiffs and counsel for the class, 15 U.S.C. §§ 77z-1(a)(3)(B)(iii), (B)(v), 78u-4(a)(3)(B)(iii), (B)(v) (2006), raising the pleading standard, id. § 78u-4(b)(1)–(2), and eliminating joint and several liability, id. §§ 77k(f), 78u-4(f). Elimination of joint and several liability targets the so-called "whipsaw" effect, in which small and even innocent defendants can be induced to settle in face of the risk that, if they refuse, joint and several liability principles may leave them "holding the bag" in the form of huge damage awards. See Steven C. Salop & Lawrence J. White, Treble Damages Reform: Implications of the Georgetown Project, 55 Antitrust L.J. 73, 93 (1986) (describing "whipsaw" effect).

34. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007) (holding federal pleading standards require plaintiffs to plead enough facts to state "plausible" claim).

35. Ashcroft v. Iqbal, 556 U.S. 662, 666 (2009) (finding allegations of governmental abuses motivated by religious animus insufficient to meet pleading standard articulated in *Twombly*).

36. On the expansion of Rule 26, see Arthur R. Miller, The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?, 78 N.Y.U. L. Rev. 982, 1013–15 (2003) (describing how recent amendments to Rule 26 have provided greater judicial control over discovery). On *Twombly* and *Iqbal*, see Jonah B. Gelbach, Note, Locking the Doors to Discovery? Assessing the Effects of *Twombly* and *Iqbal* on Access to Discovery, 121 Yale L.J. 2270, 2283–84 (2012) (reviewing debate about likely effect of greater trial court discretion after *Twombly* and *Iqbal*). For a concise recent overview of the various means by which institutional designers might seek to constrain private enforcement efforts, see J. Maria Glover, The Structural Role of Private Enforcement Mechanisms in Public Law, 53 Wm. & Mary L. Rev. 1137, 1160–75 (2012).

37. See, e.g., Frederick Schauer & Richard Zeckhauser, The Trouble with Cases, *in* Regulation Versus Litigation: Perspectives from Economics and Law 45, 46–59 (Daniel P.

of the other reform approaches are too blunt: Reducing payouts or raising pleading requirements impairs the "remedial machinery"[38] across the board and thus risks screening out meritorious and unmeritorious claims alike.[39] Moreover, private enforcers vary, often substantially, in their motives and means, complicating efforts to tailor payouts. For example, critics have long argued that antitrust law overdeters socially valuable business activity because certain classes of plaintiffs (e.g., business competitors) are already well-incentivized to detect and prosecute violations compared to others (e.g., end consumers) and yet are still able to reap statutory treble damages.[40] In these and other areas, calibration efforts designed to achieve a given level of enforcement effort require substantial amounts of information and, as a result, are often imprecise.

B. *The Critical Problems of Information, Expertise, and Specialization*

An alternative to the above approaches to rationalizing private enforcement regimes focuses less on litigation quantity and more on its quality by shaping the identities and capacities of the private enforcers themselves. The most direct way to achieve this is to narrow standing to those plaintiffs who have the best information or the most expertise about violations. A prominent example is the judge-made antitrust doctrine set forth in *Illinois Brick Co. v. Illinois*,[41] which limits standing to sue

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Kessler ed., 2011) ("[T]he goals and incentives of the litigation process are likely to contribute to aberrational rather than representative cases being the subject of lawsuits . . . caus[ing] the policy that emerges from litigation to be systematically based on an imperfect picture of the terrain that the policy is designed to regulate.").

38. See Pamela S. Karlan, Disarming the Private Attorney General, 2003 U. Ill. L. Rev. 183, 185 (noting courts retrench civil rights protections by leaving formal private rights of action in place but "constrict[ing] the remedial machinery").

39. See Choi, Merits, supra note 29, at 615 (finding, through matching procedure using pre- and post-PSLRA cases, substantial number of non-nuisance cases lacking outward, prefiling indicia of fraud were not brought post-PSLRA); Stephen J. Choi & Robert B. Thompson, Securities Litigation and Its Lawyers: Changes During the First Decade After the PSLRA, 106 Colum. L. Rev. 1489, 1497–98 (2006) (finding post-PSLRA shift away from lower-value claims, which presumably constitute mix of meritorious and non-meritorious claims); Eric Talley & Gudrun Johnsen, Corporate Governance, Executive Compensation and Securities Litigation 25 (Univ. of S. Cal. Law Sch., John M. Olin Found., CLEO Research Paper Series, Paper No. C04-4 & Law & Econ. Research Paper No. 04-7, 2004), available at http://ssrn.com/abstract=536963 (on file with the *Columbia Law Review*) (suggesting PSLRA discourages more meritorious than frivolous litigation); see also Salop & White, supra note 33, at 88 ("Tightening liability standards deters only the undesirable cases whereas detrebling could deter the desirable cases as well.").

40. Salop & White, supra note 33, at 88 (noting "rationale for detrebling damages in competitor suits is that they are well situated to detect violations and so require less financial incentive to ferret out violations and sue"); see also Robert G. Bone, Modeling Frivolous Suits, 145 U. Pa. L. Rev. 519, 534 (1997) (discussing extra-legal aims of many business competitors who file lawsuits).

41. Ill. Brick Co. v. Illinois, 431 U.S. 720, 734–35 (1974).

for damages to "direct purchasers" and is designed at least in part to ensure that those with the best information about anticompetitive conduct will prosecute enforcement actions.[42] Another example comes from federal securities law: The Private Securities Litigation Reform Act (PSLRA) requires courts to presume that the plaintiff with the "largest financial interest in the relief sought"—a position typically occupied by sophisticated institutional investors—is the appropriate lead plaintiff in multiparty suits and so must select lead counsel.[43]

These provisions do not just leverage already-existing information or expertise. By narrowing the pool of enforcers, they also induce would-be enforcers to affirmatively invest in information and regime-specific expertise by facilitating recapture of that investment. Standing provisions might thereby cause private enforcers to become, invoking once more Galanter's influential typology, relatively expert and specialized "repeat players" (as compared to "one-shotters") within the regime.[44] Nor do such efforts have to be limited to claimants. Regulatory designers might also seek to induce plaintiffs' counsel to invest in regime-specific expertise as a way to achieve a desired volume or intensity of enforcement, though, as discussed in more detail in Part IV, the mechanisms for doing so are more complicated.[45]

1. *Potential Advantages of Expertise and Specialization.* — Even if mechanisms exist by which regulatory designers can shape private enforcement capacity, a question remains whether expertise or specialization should be encouraged at all. On the one hand, expertise and specialization may bring substantial benefits. First, specialized enforcers—whether repeat-play plaintiffs or a specialized plaintiffs' bar—may prove to be more accurate screeners of case merits, ensuring that

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42. See, e.g., William M. Landes & Richard A. Posner, Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of *Illinois Brick*, 46 U. Chi. L. Rev. 602, 609 (1979) (asserting direct purchasers have better information than indirect purchasers and so are more likely to uncover violations and serve as more accurate and less costly private policemen). For a critical view and literature review, see Andrew I. Gavil, Thinking Outside the *Illinois Brick* Box: A Proposal for Reform, 76 Antitrust L.J. 167, 191–92 (2009) (arguing *Illinois Brick* should be overruled because, among other things, direct purchasers may have limited incentives to enforce where they can pass costs through to downstream market actors). Courts have likewise developed broader doctrines limiting antitrust standing to competitors and consumers. See generally Joseph F. Brodley, Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals, 94 Mich. L. Rev. 1, 17–22 (1995) (reviewing cases).

43. See 15 U.S.C. §§ 77z-1(a)(3)(B)(iii)(I)(bb), 78u-4(a)(3)(B)(iii)(I)(bb) (2006) (largest stake presumption provisions); id. §§ 77z-1(a)(3)(B)(v), 78u-4(a)(3)(B)(v) (lead counsel selection provisions); see also id. §§ 77z-1(a)(3)(B)(vi), 78u-4(a)(3)(B)(vi) (professional plaintiff restriction provisions); id. §§ 77z-1(a)(4), 78u-4(a)(4) (lead plaintiff recovery provisions).

44. Galanter, supra note 12, at 97.

45. See infra Part IV.B (discussing challenges of institutional design).

more meritorious cases get litigated and less meritorious ones do not by providing quality signals to courts or to counsel further down referral networks.[46] Second, specialization can generate economies of scale, which can minimize enforcement costs while at the same time leveling the playing field by ensuring that plaintiff-enforcers, as much as defendants, can "play for rules" or have sufficient skill and resources to litigate to judgment in the event of a settlement impasse.[47] Third,

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46. It is well known that the plaintiffs' bar operates as a complicated referral system that allocates cases to firms. See, e.g., Samuel Issacharoff, "Shocked": Mass Torts and Aggregate Asbestos Litigation After *Amchem* and *Ortiz*, 80 Tex. L. Rev. 1925, 1928 (2002) ("The plaintiffs' market operates through an elaborate referral system that concentrates cases in the hands of a small number of repeat-player firms."); John Fabian Witt, Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System, 56 DePaul L. Rev. 261, 273–74 (2007) (describing "referral networks" within plaintiffs' bar). It is also relatively uncontroversial that plaintiffs' lawyers have the capacity to successfully "screen" and "filter" cases on the merits. See, e.g., Herbert M. Kritzer, Risks, Reputations, and Rewards 67, 71–76 (2004) (describing case-screening practices of contingent-fee plaintiffs' bar); Catherine T. Harris, Ralph Peeples & Thomas B. Metzloff, Does Being a Repeat Player Make a Difference? The Impact of Attorney Experience and Case-Picking on the Outcome of Medical Malpractice Lawsuits, 8 Yale J. Health Pol'y L. & Ethics 253, 257 (2008) [hereinafter Harris et al., Repeat Player] (noting plaintiff- and defense-side lawyers alike "perform a screening function"); Herbert M. Kritzer, Contingent Fee Lawyers as Gatekeepers in the Civil Justice System, 81 Judicature 22, 29 (1997) (examining data on "case-screening patterns and practices" of contingent-fee plaintiffs' bar and finding "contingency fee lawyers do operate as gatekeepers: they turn away substantial numbers of potential clients, most often because those potential clients simply do not have a basis for pursuing the case"); Michael J. Saks, Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?, 140 U. Pa. L. Rev. 1147, 1190–92 (1992) ("[L]awyers engage in some filtering of cases and turn away a large number of them."); Stephen J. Spurr, Referral Practices Among Lawyers: A Theoretical and Empirical Analysis, 13 Law & Soc. Inquiry 87, 100–02 (1988) (describing referral practices). Even so, establishing this claim, as with any empirical claim relating to case "quality," is difficult. The broader question is whether more specialized attorneys have substantially *better* screening capacity than less specialized attorneys and, relatedly, how and if the screening efforts of these more specialized attorneys impact the ability of claimants to retain counsel further down the food chain. On the latter, it is possible that would-be plaintiffs will, upon being rejected (and not referred) by a specialized firm, decide to "lump it" rather than seek out lower-order counsel willing to take their cases. It is also possible, however, that most would-be plaintiffs who are spurned by top counsel will be able and willing to find lower-order counsel who will take their cases, limiting any "screening" effect. For further discussion of these case-screening dynamics, see infra Part IV.

47. See Galanter, supra note 12, at 100 (noting ability of repeat players to "play for rules" by strategically sequencing cases or selecting cases for appeal in an effort to bend doctrine in their favor); id. at 98 (noting repeat players "enjoy economies of scale and have low start-up costs for any case"); Herbert M. Kritzer, From Litigators of Ordinary Cases to Litigators of Extraordinary Cases: Stratification of the Plaintiffs' Bar in the Twenty-First Century, 51 DePaul L. Rev. 219, 232 (2001) (noting organized, repeat-play plaintiffs' bar has amassed sufficient resources such that it is not clear if plaintiffs or corporate defendants have resource advantage); Stephen C. Yeazell, Re-Financing Civil Litigation, 51 DePaul L. Rev. 183, 199 (2001) (arguing specialization yields "returns to

specialized or repeat-play plaintiffs might prove to be better monitors of counsel, thus mitigating widespread concerns about counsel-client agency costs, especially in the class action context.[48] Indeed, the PSLRA's "lead plaintiff" provisions were based at least in part on a belief that institutional investors piloting securities fraud actions would develop repeat relationships with the securities plaintiffs' bar, placing downward pressure on fee arrangements and ensuring selection of relatively more expert class counsel.[49] Finally, specialists may prove more responsive to cues from legislatures or agencies compared to less seasoned enforcers, ensuring a closer alignment between private enforcement efforts and public priorities. Specialization may thus mitigate the commonly asserted concern that private enforcement disrupts government regulatory schemes and yields piecemeal and democratically unaccountable regulatory efforts.[50]

2. *Potential Disadvantages of Expertise and Specialization.* — Despite the rosy portrait above, there is also reason to believe that specialization may fail to deliver promised benefits and may even impose substantial costs. First, the ability of specialized counsel to play a salutary gatekeeper role depends in substantial part on the presence of "queuing" effects, in which more specialized or expert firms sit atop referral networks and get the first look at cases entering the system.[51] But markets for the retention and referral of legal services may be inefficient or distorted. In simplest terms, repeat-play counsel may be no more expert than one-shotters at gauging case merits, or they may not even get the first crack at cases.

Second, more experienced or specialized enforcers may prove more likely than one-shotters to initiate socially undesirable enforcement efforts. Specialized counsel will necessarily have a less diversified "portfo-

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scale that derive from having a set of cases with similar subject matter, as well as greater returns from any particular case").

48. For a classic treatment of class-action agency costs, see John C. Coffee, Jr., Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation, 100 Colum. L. Rev. 370, 376 (2000).

49. See Stephen J. Choi, Drew T. Johnson-Skinner & A.C. Pritchard, The Price of Pay to Play in Securities Class Actions, 8 J. Empirical Legal Stud. 650, 652 (2011) [hereinafter Choi et al., Pay to Play] (describing aims of PSLRA's "lead plaintiff" provisions).

50. See Stephenson, supra note 24, at 117–20 (noting commonly articulated concern that piecemeal private enforcement efforts may undermine efforts by public enforcers to develop unitary, coherent, and democratically accountable enforcement strategy); see also Jeannette L. Austin, Comment, The Rise of Citizen-Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General, 81 Nw. U. L. Rev. 220, 260 (1987) (arguing courts are skeptical of citizen suits in environmental context because private enforcers "will be unable to develop the same kind of long-term relationship with potential violators that enables an agency to attain the optimal mix of compliance and deterrence").

51. See Witt, supra note 46, at 280 (describing queuing effects).

lio" of representations than nonspecialists, with two possible effects.[52] First, specialization, by reducing the marginal cost of filing and litigating cases, may thereby permit pursuit of more marginal and potentially more socially costly cases relative to nonspecialists.[53] At the extreme, specialized enforcers may come to "speculate" in enforcement efforts or become "filing mills."[54] Second, specialization may render firms vulnerable to sudden legislative or judicial contraction of legal mandates.[55] In response to such a contraction, specialized firms that have made substantial regime-specific investments may maintain filings even as the prospect of success declines in an effort to recoup past investment. Where either of these dynamics holds true, one might predict that specialized enforcers will achieve no greater success, or even *lower* rates of success, than less specialized enforcers.

Some critics go further and suggest that specialization begets other, more troubling litigation practices. The long saga of asbestos litigation in recent decades provides a salient example. On the one hand, specialized plaintiffs' firms developed bulk settlement strategies that minimized transaction costs and ensured compensation for claimants with legitimate

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52. See John Coffee, Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 Colum. L. Rev. 669, 704–08 (1986) (reviewing firm-level incentives and disincentives to grow larger and thus maintain more diversified claim "portfolios").

53. See, e.g., Stephenson, supra note 24, at 114–15 (discussing social costs of private enforcement actions); Todd J. Zywicki, Institutions, Incentives, and Consumer Bankruptcy Reform, 62 Wash. & Lee L. Rev. 1071, 1094 (2005) (noting law firm specialization may bring economies of scale that reduce marginal cost of filing in bankruptcy context).

54. See Nora Freeman Engstrom, Run-of-the-Mill Justice, 22 Geo. J. Legal Ethics 1485, 1491–1503 (2009) (discussing high-volume legal practice and impact of routinization on firm assessment of case value). Litigation critics have long raised the specter of "filing mills" across multiple legal regimes. As just one concrete example, media and scholarly attention has recently turned to the development of high-volume filing practices under Titles II and III of the Americans with Disabilities Act (ADA). See, e.g., Samuel R. Bagenstos, The Perversity of Limited Civil Rights Remedies: The Case of "Abusive" ADA Litigation, 54 UCLA L. Rev. 1, 21–25 (2006) (noting trend of for-profit civil rights firms adopting strategy of filing "serial suits" to cover costs and turn profit and arguing limited damages remedies in civil rights context may perversely generate more, and more abusive, litigation rather than less); Overlawyered, http://overlawyered.com/tag/ada-filing-mills/ (on file with the *Columbia Law Review*) (last visited Sept. 1, 2012) (criticizing alleged "filing mills" in ADA context).

55. Stephen Daniels & Joanne Martin, It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs' Practice in Texas, 80 Tex. L. Rev. 1781, 1795 (2002) ("Plaintiffs' practice has always been a precarious enterprise because the market in which these lawyers work is an inherently unstable one . . . . Changes in the law may provide new or enhanced opportunities for some plaintiffs' lawyers, but they can also put others out of business."); cf. Randall R. Bovbjerg, Frank A. Sloan, Avi Dor & Chee Ruey Hsieh, Juries and Justice: Are Malpractice and Other Personal Injuries Created Equal?, Law & Contemp. Probs., Winter 1991, at 5, 12 (noting successful plaintiffs' firms speculate in complex litigation by developing diversified portfolios of lawsuits as hedge against both abrupt statutory or doctrinal change and idiosyncratic losses).

but small, and thus nonmarketable, claims.[56] And yet, some repeat-player firms, in league with unscrupulous physicians, also developed highly routinized schemes for manufacturing fraudulent diagnoses of asbestos-related disease as a way to build claim inventories.[57] Beyond the asbestos context, litigation critics have long argued that specialized counsel with detailed knowledge of a regulatory regime's pressure points and a sophisticated ability to utilize public relations as an extralegal weapon can deploy litigation as a form of legalized blackmail.[58]

Consider as well the claim, set forth previously, that specialization will bring private enforcement efforts into closer alignment with public regulatory priorities. As an initial matter, specialization may have the precise opposite effect. More expert private enforcers may be *less* dependent on the solicitude of public enforcers to achieve litigation success and may therefore prove *less* likely to hew to government regulatory priorities. To be sure, this can be cast as a good thing: An oft-invoked advantage of private enforcement is that private enforcers will fill enforcement gaps left by public enforcers who are unable or unwilling to enforce.[59]

But specialization might also push too far in the other direction. Specialized enforcers may be more able to identify or even anticipate

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56. Stephen J. Carroll et al., Research and Dev. Corp. Inst. for Civil Justice, Asbestos Litigation Costs and Compensation: An Interim Report 23 (2002) ("[L]itigating claims en masse lowered the cost and risk per claim for plaintiff law firms."); Deborah R. Hensler, As Time Goes By: Asbestos Litigation After *Amchem* and *Ortiz*, 80 Tex. L. Rev. 1899, 1912–13 (2002) (noting advantages of "litigating en masse," including cost-spreading and negotiation leverage, that allowed plaintiffs' attorneys to achieve settlement of less serious asbestos claims that might not have been possible in absence of more serious cases).

57. See John C. Coffee, Jr., Class Wars: The Dilemma of Mass Tort Class Actions, 95 Colum. L. Rev. 1343, 1373–76 (1995) (discussing "new" collusion between parties' attorneys in mass tort litigation made possible by repeat play); James L. Stengel, The Asbestos End-Game, 62 N.Y.U. Ann. Surv. Am. L. 223, 235 (2006) (noting multiple studies showing significant number of plaintiff claimants without any objective evidence of asbestos-related illness).

58. See generally Charles Silver, "We're Scared to Death": Class Certification and Blackmail, 78 N.Y.U. L. Rev. 1357 (2003) (identifying but dismissing claim). As a concrete example, in the recent blockbuster Title VII case, *Wal-Mart v. Dukes*, respondents and multiple amici raised the specter of "blackmail settlements." See, e.g., Brief for the Chamber of Commerce of the United States of America as Amicus Curiae Supporting Petitioner, Wal-Mart Stores v. Dukes, 131 S. Ct. 2541 (2011) (No. 10-277), 2011 WL 288900, at *21–*22 (noting class certification dramatically raises stakes in litigation for defendants, often creating "'intense pressure to settle'" even weak claims in way tantamount to "'judicial blackmail'" (citing Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996); In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995))); Brief of Intel Corporation as Amicus Curiae Supporting Petitioner, *Wal-Mart Stores*, 131 S. Ct. (2011) (No. 10-277), 2011 WL 288897, at *8–*9 ("It is universally recognized that [liability, litigation costs, and public-relations] pressures allow opportunistic plaintiff's [sic] (and their counsel) to extract undeserved settlements from defendants.").

59. See supra note 24 (noting private enforcement aids in closing public enforcement gaps).

public enforcement priorities and so may be more likely to tee up duplicative and "parasitic" enforcement efforts that inefficiently piggyback on already-existing government enforcement initiatives.[60] Worse, specialization may yield a form of clientelism.[61] Securities scholars, for instance, have warned that the PSLRA's "lead plaintiff" provisions create pay-to-play situations. For example, law firms make campaign contributions to elected officials connected to the public pension funds that frequently win selection as lead plaintiffs in securities class actions.[62] Such practices might be particularly worrying to those who believe that private enforcers should play a salutary agency-forcing or anticapture role, for it is specialized private enforcers who might be best positioned to serve such a function.

3. *Temporal Dimension of Expertise and Specialization.* — Finally, the role of expertise and specialization in private enforcement regimes may have an important temporal dimension. One possibility is that specialization confers important advantages—and plays a salutary social role—early in the life of a private enforcement regime, as newly minted statutory mandates are fleshed out via litigation. As doctrinal positions and procedural mechanisms become settled, however, expertise and specialization may become less valuable—and may, in fact, become a net social liability—as specialized enforcers devise ways to exploit an increasingly routinized system (the asbestos example) or press socially undesirable enforcement efforts in an effort to recapture regime-specific investment in the face of declining violations. A contrary possibility is that the returns to expertise and specialization will in fact increase over the life of the regime and lead to monopoly or oligopoly within private enforcer ranks, with relatively few private enforcers increasingly dominating the field.[63] The result might be efficient economies of scale. But consolidation might also lead to sclerotic enforcement efforts,

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60. See John C. Coffee, Jr., Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working, 42 Md. L. Rev. 215, 220–22 (1983) (noting "piggyback" concern).

61. Cf. Jonathan R. Macey & Geoffrey P. Miller, Reflections on Professional Responsibility in a Regulatory State, 63 Geo. Wash. L. Rev. 1105, 1106 (1995) ("[B]ecause private-sector lawyers often are 'repeat-players' in their actions before government regulators, they have strong incentives not to alienate the bureaucrats.").

62. See Choi et al., Pay to Play, supra note 49, at 678 (summarizing past studies and offering empirical test strongly suggesting clientilistic and collusive relations between plaintiff-side securities firms and state politicians linked to public pension funds that frequently serve as lead plaintiffs).

63. Classic law and economics scholarship on public versus private enforcement considers the efficiency gains and losses that result from "competitive" private enforcement as compared to a single, monopolistic private enforcer. See, e.g., A. Mitchell Polinsky, Private Versus Public Enforcement of Fines, 9 J. Legal Stud. 105, 115, 117 (1980) (modeling "competitive" and "monopolistic" enforcers and concluding private enforcement leads to underenforcement in many cases).

increased clientelism between public and private enforcers, or capture of public enforcement agencies by private enforcers.

C. *Existing Empirical Work*

Though these issues have generated a great deal of debate, few empirical studies test whether specialists perform better than nonspecialists.[64] The main culprit is empirical tractability: It is difficult to find self-contained private enforcement regimes in which case outcomes, including litigated judgments and (often confidential) settlements, are fully observable.[65]

Some of the best-developed work to date is in the securities context, much of it testing the effects of the PSLRA.[66] Empirical studies have found that the PSLRA's "lead plaintiff" provisions increased the number of institutional plaintiffs serving in that role, and that such plaintiffs tend to win more and larger settlements while incurring lower counsel fees.[67]

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64. See generally Gillian Hadfield, Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases, 57 Stan. L. Rev. 1275, 1277 (2005) ("The existing empirical literature on the legal system—thin as it is—nevertheless devotes next to no attention to distinctions between litigant types.").

65. See Harris et al., Repeat Player, supra note 46, at 262 (noting difficulty "in determining case outcomes with precision" in studying tort system); Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States, 7 J. Empirical Legal Stud. 175, 187 (2010) (noting data on settlement size is often unavailable because of confidentiality agreements, making it difficult to draw inferences about litigation regime's workings).

66. For a recent overview, see James D. Cox & Randall S. Thomas, Mapping the American Shareholder Experience: A Survey of Empirical Studies of the Enforcement of the U.S. Securities Laws (Vanderbilt Univ. Law Sch., Law & Econ. Research Paper No. 09-10, Duke Univ. Law Sch., Pub. Law & Legal Theory Research Paper No. 246, 2009), available at http://ssrn.com/abstract=1370508 (on file with the *Columbia Law Review*).

67. See James D. Cox & Randall S. Thomas, Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions, 106 Colum. L. Rev. 1587, 1618–19, 1622–25 (2006) (finding institutional plaintiffs win vast majority of disputed lead plaintiff positions and their presence as lead plaintiff improves size of securities settlements, holding other factors constant); James D. Cox, Randall S. Thomas & Lynn Bai, There Are Plaintiffs and . . . There Are Plaintiffs: An Empirical Analysis of Securities Class Action Settlements, 61 Vand. L. Rev. 355, 368–80 (2008) (finding uptick in public pensions' service as lead plaintiffs and finding strong correlation between such service and settlement size); Michael Perino, Institutional Activism Through Litigation: An Empirical Analysis of Public Pension Fund Participation in Securities Class Actions, 9 J. Empirical Legal Stud. 368, 383–85 (2012) (finding public pension participation as lead plaintiffs correlates with higher investor recoveries and lower attorney fee requests and awards); Ellen M. Ryan & Laura E. Simmons, Cornerstone Research, Securities Class Action Settlements—2010 Review and Analysis 14 fig.13 (2011), available at http://www.cornerstone.com/securities_settlements_2010 (on file with the *Columbia Law Review*) (reporting five plaintiff-side securities firms were responsible for 61% of payouts in securities class actions over period 2009–2010). But see Stephen J. Choi, Jill E. Fisch & A.C. Pritchard, Do

As noted previously, however, the PSLRA may have facilitated collusion between the handful of leading securities firms and the public pensions most likely to serve as lead plaintiffs, thus solidifying, rather than eroding, leading firms' dominance.[68] On the latter point, note that by focusing on a firm's annual recovery share, these studies cannot say whether more experienced securities firms have garnered a larger share of recoveries by filing more cases (and possibly "speculating" in litigation efforts), cherry-picking larger or more meritorious cases, or litigating cases more skillfully. Finally, while a few studies compare "follow-on" cases filed in the wake of public enforcement actions to "independent" cases,[69] none examines *which* enforcers initiate such efforts in order to better understand the public-private nexus.

Other litigation areas that have generated rigorous empirical work on the role of specialization and expertise include immigration adjudication and patent law. On the former, a recent large-scale study found substantial returns to specialization in the litigation of refugee claims in Canada.[70] On the latter, studies of the patent system have focused in particular on the role of so-called "non-practicing entities" (NPEs) (or, more disparagingly, "patent trolls") that specialize in acquiring and enforcing patent portfolios without actually producing or using the underlying technology. A growing body of evidence suggests that trolls account for a large proportion of patent suits, yet these entities are rela-

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Institutions Matter? The Impact of the Lead Plaintiff Provision of the Private Securities Litigation Reform Act, 83 Wash. U. L.Q. 869, 896–900 (2005) (finding no correlation between size of attorney fee awards and presence of public pension fund as lead plaintiff after controlling for case size).

68. See supra note 62 and accompanying text (discussing possibility that PSLRA may lead to stronger monopolization of market); see also Choi & Thompson, supra note 39, at 1515 (showing little or no change in identities of top-grossing plaintiff-side securities firms pre- and post-PSLRA).

69. See Maria Correia & Michael Klausner, Are Securities Class Actions "Supplemental" to SEC Enforcement? An Empirical Analysis 26 (Feb. 23, 2010) (unpublished manuscript), available at www.law.upenn.edu/academics/institutes/ile/PNYUPapers/2010/Klausner_AreSecuritiesClassActions.pdf (on file with the *Columbia Law Review*) (finding, among other things, private enforcement actions tend to target relatively larger cases compared to SEC enforcement, suggesting profit motivation shapes case selection); see also James D. Cox & Randall S. Thomas, SEC Enforcement Heuristics: An Empirical Inquiry, 53 Duke L.J. 737, 777–79 (2003) (finding roughly 15% of settled private securities cases have parallel SEC action and solo SEC actions tend to pursue smaller capitalization firms whereas solo private enforcement actions target larger capitalization firms). Other studies examine the interaction of public and private enforcement but offer only anecdotal evidence. See, e.g., Tamar Frankel, Implied Rights of Action, 67 Va. L. Rev. 553, 580 (1981) (noting SEC has largely left enforcement of proxy rules to private plaintiffs).

70. See Sean Rehaag, The Role of Counsel in Canada's Refugee Determination System: An Empirical Assessment, 49 Osgoode Hall L.J. 71, 89 (2011) (finding counsel who had provided representation in more than 250 refugee determinations in Canada's immigration adjudication regime were nearly 70% more likely than one-shotters to achieve success).

tively *less* successful in their efforts.[71] The result is a rich, and increasingly data-driven, debate about the role different enforcer types play in achieving, or defeating, patent's policy ends.[72]

Other paradigmatic private enforcement regimes, however, have been subject to surprisingly little systematic analysis of private enforcer characteristics, much less convincing analysis of the role of private enforcement capacity within the regime as a whole. As noted previously, a large and growing literature focused on job discrimination litigation has attempted to untangle the relationship between damages and attorneys' fees on the one hand and filing rates and counsel availability on the other.[73] A separate literature has attempted to quantify overall litigation success rates among job discrimination plaintiffs at the trial and appellate levels.[74] But beyond a handful of mostly qualitative analyses, we know

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71. The best study to date is John R. Allison, Mark A. Lemley & Joshua Walker, Patent Quality and Settlement Among Repeat Patent Litigants, 99 Geo. L.J. 677, 690 (2011) (examining 1,134 patent suits, including separate pools of "once-litigated" and "most-litigated" patents, and finding NPEs were no more or less likely to settle cases than non-NPEs but were five times less likely to win cases litigated to judgment); see also Colleen V. Chien, Of Trolls, Davids, Goliaths, and Kings: Narratives and Evidence in the Litigation of High-Tech Patents, 87 N.C. L. Rev. 1571, 1572 (2009) (finding patent trolls initiate between 17% and 26% of all high-tech patent suits, but tend to sue later in patent lifecycle, surprising their targets—typically mature companies that have already developed and sold allegedly infringing products—and pursuing multiple defendants simultaneously). On the debate about how to define "troll," see id. at 1577–78.

72. See Michael Risch, Patent Troll Myths, 42 Seton Hall L. Rev. 457, 462–66 (2012) (summarizing arguments for and against patent trolls); James E. Bessen, Jennifer Laurissa Ford & Michael J. Meurer, The Private and Social Costs of Patent Trolls 3–6 (Bos. Univ. Sch. of Law, Working Paper No. 11-45, 2011), available at http://ssrn.com/abstract=1930272 (on file with the *Columbia Law Review*) (examining whether new crop of NPEs improves market for small inventors or exploits weaknesses in patent system). One argument against trolls is that, because they do not produce a product or sell a service, they are immune to counterclaims for patent enforcement and so are unlikely to enter into low-cost cross-licensing settlements, leaving less room for settlement of litigation. Id. at 25. Defenders, on the other hand, assert that patent trolls "create patent markets, and those markets enhance investment in start-up companies by providing additional liquidity options," "help businesses crushed by larger competitors . . . infringe valid patents with impunity," and "allow individual inventors to monetize their inventions." Risch, supra, at 459.

73. See supra note 29 and accompanying text (discussing relationship between economic incentives and private enforcers' willingness to litigate).

74. See, e.g., Kevin M. Clermont & Stewart J. Schwab, Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?, 3 Harv. L. & Pol'y Rev. 103, 131–32 (2009) (finding results disfavor job discrimination plaintiffs at all litigation stages, from pre-trial motions to appeals); Kevin M. Clermont & Stewart J. Schwab, How Employment Discrimination Plaintiffs Fare in Federal Court, 1 J. Empirical Legal Stud. 429, 455–56 & fig.12 (2004) (finding low success rates among job discrimination plaintiffs in federal district courts); Kevin M. Clermont et al., How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals, 7 Emp. Rts. & Emp. Pol'y J. 547, 566–67 (2003) (finding low success rates among job discrimination plaintiffs in federal appeals courts); Ruth Colker, The Americans with Disabilities Act: A Windfall for Defendants, 34 Harv. C.R.-C.L.

little about how *particular* plaintiff or counsel types differ in the nature of cases brought and outcomes achieved, or how public and private enforcers interact within the system.[75]

L. Rev. 99, 100 (1999) (examining published decisions and finding defendants prevail in more than 93% of reported ADA job discrimination cases); Ruth Colker, Winning and Losing Under the Americans with Disabilities Act, 62 Ohio St. L.J. 239, 277–78 (2001) (examining published decisions and finding disability appellate litigation outcomes are more pro-defendant than those under other civil rights statutes); Laura Beth Nielsen & Robert L. Nelson, Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System, 2005 Wis. L. Rev. 663, 703–07 (charting growth of job discrimination claims during 1990s and finding rise in proportion of cases dismissed without judgments and decline in proportion that go to trial).

75. What little work exists in this vein offers mostly anecdotal views. See, e.g., Michael Selmi, Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment, 45 UCLA L. Rev. 1401, 1404 (1998) (arguing, in civil rights context, DOJ has tended to pursue "small, politically inoffensive, and easy cases, leaving the private bar to tackle the difficult and important discrimination claims"); see also Catherine Albiston & Laura Beth Nielsen, The Procedural Attack on Civil Rights: The Empirical Reality of *Buckhannon* for the Private Attorney General, 54 UCLA L. Rev. 1087, 1116 (2007) (reporting results of survey of public interest organizations engaged in civil rights litigation); Bagenstos, supra note 54, at 1 (countering criticisms of high-volume and "serial" civil rights practitioners but offering no empirical analysis of incidence or make-up); Michael Ashley Stein, Michael E. Waterstone & David B. Wilkins, Cause Lawyering for People with Disablities, 123 Harv. L. Rev. 1658, 1670–73 (2010) (book review) (noting "complete absence" of "disability cause lawyers" among counsel who initiated ADA cases ultimately heard by Supreme Court, but offering mostly anecdotal analysis about social organization of disability-related litigation efforts); Michael E. Waterstone, Michael Ashley Stein & David B. Wilkins, Disability Cause Lawyers, 53 Wm. & Mary L. Rev. 1287, 1287 (2011) (offering qualitative overview of organized disability plaintiffs' bar). Perhaps the most comprehensive case-level study of Title VII lawsuits, encompassing some 2,000 job discrimination suits filed between 1988 and 2003, found that cases brought as part of a "collective legal mobilization"—defined as (i) cases brought by public interest law firms; (ii) aggregated cases (whether involving multiple plaintiffs or seeking and winning class certification); and (iii) cases joined by the EEOC—enjoyed relatively greater success at nearly every litigation stage. Nielsen, Nelson & Lancaster, supra note 65, at 186. However, by lumping together multiple categories into a single variable along with enforcer identity, this empirical approach permits few firm inferences about the role of experience or expertise. Another study considers state-level job discrimination enforcement and offers a relatively comprehensive view of private enforcement efforts, including the relative ability of different plaintiff types to obtain counsel rather than pursuing purely administrative claims, but does not isolate the effect of repeat-players—whether claimants or counsel—within the regime. See Gary Blasi & Joseph W. Doherty, UCLA-RAND Ctr. for Law & Pub. Policy, California Employment Discrimination Law and Its Enforcement: The Fair Employment and Housing Act at 11, 50 (2010), available at http://dfeh.ca.gov/res/docs/Renaissance/FEHA%20at%2050%20-%20UCLA%20-%20RAND%20Report_FINAL.pdf (on file with the *Columbia Law Review*) (recognizing California's three systems of law enforcement to reduce discrimination in labor market and workplace). A final, unpublished study examines the interaction of Equal Employment Opportunity Commission (EEOC) and private enforcers and quantifies the effect of internal EEOC procedures on filing rates but offers only preliminary conclusions. See Quinn Mulroy, Enforcing Rights Protections: The Regulatory Power of Private Litigation and the Equal Employment Opportunity Commission 40–41 (Aug. 2011) (unpublished manuscript) (on

Antitrust litigation and "citizen suits" brought under federal environmental law are even shorter on empirical analysis. A handful of studies conducted in the 1980s provided a purely descriptive account of the enforcement landscape in both areas, particularly of the identity of plaintiffs who initiate claims.[76] However, virtually no serious empirical inquiry has followed either of these decades-old efforts.[77]

Finally, scholarship assessing the impact of specialization in common-law tort actions is, at best, thin.[78] Perhaps the best study to date was conducted in 2005 using medical malpractice data supplemented with attorney interviews and found substantial returns to specialization.[79]

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file with the *Columbia Law Review*) (explaining new EEOC system caused delay that has "frustrated private litigation efforts").

76. See, e.g., Envtl. Law Inst., Citizen Suits: An Analysis of Citizen Enforcement Actions Under EPA-Administered Statutes (1984) (finding 162 out of 214 Clean Air Act citizen suits brought by "a coalition of national regional environmental groups"); Thomas E. Kauper & Edward A. Snyder, An Inquiry into the Efficiency of Private Antitrust Enforcement: Follow-on and Independently Initiated Cases Compared, 74 Geo. L.J. 1163, 1220–24 (1985) (examining large dataset of more than 400 antitrust cases filed between 1973 and 1983 and finding, among other things, success rate of customer plaintiffs exceeds that of competitor plaintiffs); Salop & White, supra note 33, at 82 (finding business competitors initiated more than one fifth of private antitrust claims).

77. Welcome recent exceptions in the antitrust context include C. Scott Hemphill, An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition, 109 Colum. L. Rev. 629, 629 (2009) (analyzing 143 patent settlements "between brand-name drug makers and their generic rivals"); C. Scott Hemphill, Drug Patent Settlements Between Rivals: A Survey 3 (Mar. 12, 2007) (unpublished working paper), available at http://ssrn.com/abstract=969492 (on file with the *Columbia Law Review*) ("classif[ying] and analyz[ing] patent settlements reached between . . . drug makers and . . . generic rivals" and resulting antitrust suits). In the environmental context, a single recent empirical study examines public-private interaction and attempts to gauge the extent to which private enforcement efforts "crowd out" or "crowd in" public enforcement efforts. Christian Langpap & Jay P. Shimshack, Private Citizen Suits and Public Enforcement: Substitutes or Complements?, 59 J. Envtl. Econ. & Mgmt. 235, 237–38 (2010).

78. This is especially surprising in light of the preoccupation of torts scholars with theories of distributive justice and the related question of "who comes out ahead" in litigation, see Tsachi Keren-Paz, Torts, Egalitarianism, and Distributive Justice 5–8 (2007) (explaining distributive justice), as well as the centrality of repeat play to longstanding debates about the "efficiency" of the common law, see, e.g., William M. Landes & Richard A. Posner, Adjudication as a Private Good, 8 J. Legal Stud. 235, 260–61 (1979) (arguing repeat players will litigate more disputes involving efficient rules, further strengthening "tendency toward efficiency"); George L. Priest, The Common Law Process and the Selection of Efficient Rules, 6 J. Legal Stud. 65, 73–75 (1977) (arguing repeat players will litigate more disputes involving inefficient rules, causing them to be overturned); Paul H. Rubin, Why Is the Common Law Efficient?, 6 J. Legal Stud. 51, 53 (1977) (same).

79. Catherine T. Harris, Ralph Peeples & Thomas B. Metzloff, Who Are Those Guys? An Empirical Examination of Medical Malpractice Plaintiffs' Attorneys, 58 SMU L. Rev. 225, 236–46 (2005) (finding "seasoned plaintiffs' attorneys," defined as counsel who had handled at least four medical malpractice cases during study period, had conducted at least one malpractice trial during that same period, and had attended an in-state law

However, while an important contribution, that study was hampered by a relatively small sample size (348 cases in total), consideration of only a subset of cases (only cases ordered to mediation), and the fact that attorney experience and monetary outcomes were collected and coded in a binary as opposed to continuous fashion, substantially limiting interpretation and conclusions.[80] A second important contribution reviewed malpractice claims between 1976 and 1988 and found mixed evidence that specialization translated into greater litigation success, with only the very most experienced firms doing better—but that study is now dated.[81] The remaining studies are, meanwhile, susceptible to many of the same critiques——they are either limited by small claim size, plagued by an imprecise definition of "experience," or afflicted by the passage of time in a rapidly changing profession and litigation environment.[82]

A number of lessons can be drawn regarding the current state of knowledge about the optimal design of private enforcement regimes. It should be evident that any clear-eyed assessment of the operation of private enforcement regimes—and any rational effort at (re)designing them—will depend on an accurate empirical assessment of the identities, motives, and means of the private enforcers who populate them. And yet, strikingly little is known about how and if private enforcement capacity matters across a range of regulatory areas. Indeed, a number of key empirical questions remain almost entirely unexplored. Which, if any, of specialization's alleged advantages withstand empirical scrutiny? More concretely, under what institutional conditions will specialized enforcers

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school, were more successful than other plaintiffs' counsel in obtaining monetary judgments).

80. Id. at 230–35 (describing data and measures). A follow-up study by the same authors incorporated a survey component and examined counsel case-quality assessments, but such data was available for an even smaller sample—only fifty-two cases. See Harris et al., Repeat Player, supra note 46, at 263–65.

81. Stephen Daniels, Mary Grossman & Joy Malby Bertrand, Why Kill All the Lawyers? Repeat Players and Strategic Advantage in Medical Malpractice Claims (Am. Bar Found., Working Paper No. 9210, 1992) (on file with the *Columbia Law Review*) (finding only "super repeat player" counsel won more often and larger recoveries, in large part because they tended to provide representation in cases involving permanent injury); see also Stephen Daniels & Joanne Martin, Plaintiffs' Lawyers, Specialization, and Medical Malpractice, 59 Vand. L. Rev. 1051, 1056 (2006) (reprising earlier findings).

82. See James Kakalik et al., Variation in Asbestos Litigation Compensation and Expenses 66 (1984) (finding lawyer's asbestos-related experience may have helped to determine whether or not his clients would recover); Douglas E. Rosenthal, Lawyer And Client: Who's in Charge? 132–34 & tbl.5.2 (1977) (finding clients who employ bigger firms achieve better outcomes, but in study with sample size of merely forty-seven); H. Laurence Ross, Settled Out of Court: The Social Process of Insurance Claims Adjustment 163–64, 166–70 (2d ed. 1980) (finding specialization matters but not controlling for claim size or quality); Frank A. Sloan et al., Suing for Medical Malpractice 201, 216 (1993) (studying obstetrical and ER malpractice claims and finding medical malpractice specialists negotiated settlements nearly twice as large as sums obtained by nonspecialists in similar cases).

serve as salutary gatekeepers, and when are they likely to become "filing mills" by speculating in enforcement efforts or "clients" of the public enforcement agencies some hope they will discipline? To be sure, some of these questions may not be susceptible to straightforward empirical tests. Some—like the actual or optimal degree of alignment between public and private enforcers—will likely remain debatable. With these caveats in mind, the next Part begins the process of filling the gaps in the literature by offering an overview of the FCA's qui tam regime in advance of Part III's empirical analysis.

II. PARASITES, PROFESSIONALS, AND PLAINTIFFS' LAWYERS: THE BATTLE OVER QUI TAM

The FCA's qui tam provisions are both an exemplar of the challenges inherent in designing private enforcement regimes and a largely untapped subject of empirical study.[83] This Part provides an overview of the FCA regime, considers anecdotal claims made about the role

83. The few published empirical studies of qui tam litigation limit their analysis to healthcare cases, treat only large, successful cases, or utilize only aggregated data published annually by the DOJ. See Aaron S. Kesselheim, David M. Studdert & Michelle M. Mello, Whistle-Blowers' Experiences in Fraud Litigation Against Pharmaceutical Companies, 362 New Eng. J. Med. 1832 (2010) [hereinafter Kesselheim et al., Whistle-Blowers' Experiences] (reporting regret profiles of qui tam relators who won large recoveries in healthcare cases); Aaron S. Kesselheim & David M. Studdert, Whistleblower-Initiated Enforcement Actions Against Healthcare Fraud and Abuse in the United States, 1996 to 2005, 149 Annals Internal Med. 342 (2008) (examining healthcare cases only); Christina Orsini Broderick, Note, Qui Tam Provisions and the Public Interest: An Empirical Analysis, 107 Colum. L. Rev. 949 (2007) (using aggregated data on filings and impositions, as published annually by DOJ, to draw conclusions about workings of qui tam regime). Advocacy groups have also published reports that advance empirical claims about the identities and actions of qui tam relators but suffer from serious methodological shortcomings. See, e.g., Nat'l Whistleblowers Ctr., Impact of Qui Tam Laws on Internal Corporate Compliance (2010), available at http://www.whistleblowers.org/index.php?option=com_content&task=view&id=1169 (on file with the *Columbia Law Review*) (reporting results of analysis of 107 cases between 2007 and 2010, but considering only published opinions in which relator asserted retaliation claim under relevant provision of FCA, 31 U.S.C. § 3730(h) (2006)). Most directly relevant to the present study, a pair of working papers uses DOJ-provided data to draw an initial set of conclusions about DOJ's enforcement strategy, see David Kwok, Coordinated Private and Public Enforcement of Law: Deterrence Under Qui Tam (Feb. 18, 2010) (unpublished manuscript), https://editorialexpress.com/cgi-bin/conference/download.cgi?db_name=ALEA2010&paper_id=375 [hereinafter Kwok, Deterrence] (on file with the *Columbia Law Review*), and offers some descriptive statistics regarding the role of more experienced qui tam relator firms, see David Kwok, Does Private Enforcement Attract Excessive Litigation? Evidence from the False Claims Act, 41 Pub. Cont. L.J. (forthcoming 2012) (manuscript at 10–14) [hereinafter Kwok, Private Enforcement], available at http://ssrn.com/abstract=1832934 (on file with the *Columbia Law Review*). One of the goals of this Article, and the broader project of which it is part, is to go beyond these studies and offer a more rigorous accounting of the qui tam enforcement landscape.

of private enforcement capacity within the regime, and briefly reviews leading proposals for its reform.

A. *FCA Primer*

Enacted during the Civil War to curb fraud by Union Army contractors, the FCA has grown, in fits and starts, into the government's chief weapon against fraud in connection with federal programs and expenditures.[84] The FCA creates liability for any person who knowingly submits a false money claim to the government, uses a false statement to induce the government to pay a false claim, conspires to defraud the government into paying a false claim, or uses a false statement to reduce an obligation to pay money to the government.[85] Penalties are steep: Fines range from $5,500 to $11,000 per false claim, plus treble the amount of any proven damages.[86] While the DOJ can initiate either criminal or civil actions against fraudfeasors, in practice most FCA enforcement efforts are initiated as private lawsuits brought pursuant to the FCA's qui tam provisions.[87] Those provisions authorize private persons, dubbed "relators," to sue private parties for fraud against the United States and earn a bounty equal to a portion—ranging from 15% to 30%—of any (trebled) recovery.[88]

As Figure 1 shows, generous bounties have made qui tam suits highly attractive to private enforcers. Since 1986, when Congress enacted substantial amendments designed to revive the qui tam mechanism after decades of relative desuetude,[89] qui tam filings have exploded from a few dozen lawsuits in 1987 to more than 600 in 2011. Qui tam impositions have also risen dramatically, from around $2.3 million in 1998 to nearly $2.8 billion in 2011, which, as noted previously, easily rivals and even

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84. Claire M. Sylvia, The False Claims Act: Fraud Against the Government § 1.1 n.1 (2004).

85. 31 U.S.C. § 3729.

86. Id. § 3729(a) (setting range of penalty amounts).

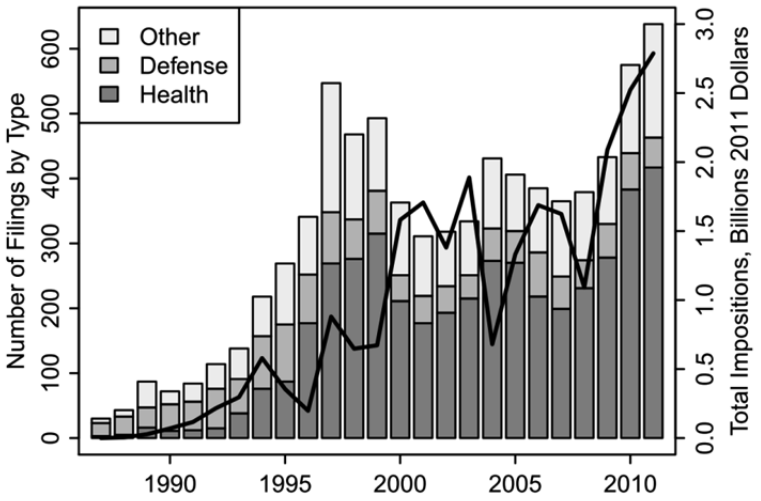
87. The reason that qui tam suits dominate the system is simple: Much fraud is hidden from view and would require public enforcers to pay near-infinite information costs. To that extent, the FCA's qui tam provisions reflect a classic whistleblower regulatory approach, deputizing private enforcers to ferret out privately held information about wrongdoing. Note the parallel here to the distinction, well-known among scholars of administrative law, between "police-patrol" and "fire alarm" oversight methods. Matthew D. McCubbins & Thomas Schwartz, Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms, 28 Am. J. Pol. Sci. 165, 167–79 (1984) (discussing distinction between two oversight methods and arguing legislators tend to prefer fire alarm oversight to police patrol oversight because former is less costly to them).

88. 31 U.S.C. § 3730(b)–(d).

89. For an overview of FCA amendments over time, including major amendments in 1943, 1986, and 2009, see Charles Doyle, Cong. Research Serv., R40785, Qui Tam: The False Claims Act and Related Federal Statutes 5–9 (2009), available at http://www.fas.org/sgp/crs/misc/R40785.pdf (on file with the *Columbia Law Review*).

eclipses filings and recoveries in other, much-analyzed areas of law, such as securities and antitrust.[90]

FIGURE 1: QUI TAM FILINGS BY CASE TYPE AND TOTAL IMPOSITIONS, 1986–2011[91]



Rising recoveries have in turn attracted a dizzying array of claims covering the waterfront of federal programs and expenditures. The most common claim types assert fraud in connection with defense procurement and federally funded healthcare services under Medicare and Medicaid. Other common claims target underpayment of oil and gas royalties for extraction of natural resources from federal lands, as well as myriad frauds in connection with federally insured education and housing loans, federal research grants, federally funded construction projects, Hurricane Katrina relief, and the Troubled Asset Relief Program.[92]

Other aspects of the FCA's hybrid structure offer a primer on the challenge of harnessing private enforcement capacity to collect statutory fines rather than damages. For instance, the FCA aims to mitigate concern about private overenforcement by granting the Attorney General—

90. Compare Fraud Statistics, supra note 2 (reporting $2.4 billion in qui tam impositions in 2010 and $2.8 billion in 2011), with Ryan & Simmons, 2011 Review, supra note 2, at 1 (reporting $3.2 billion in securities class action settlements in 2010 and $1.4 billion in 2011); see also supra note 2 (reviewing other statistics).

91. For a description of the data from which this figure is derived, see infra Part III.A.

92. For a helpful overview of claim types, see Common Types of Qui Tam Cases, Phillips & Cohen LLP, http://www.phillipsandcohen.com/Common-Types-of-Qui-Tam-Cases/ (on file with the *Columbia Law Review*) (last visited August 12, 2012).

and, by further delegation, the DOJ's Civil Fraud Section—substantial authority to oversee and control qui tam litigation. Thus, the DOJ may dismiss or settle a qui tam case out from under a private relator, subject only to a basic fairness hearing.[93] In addition, the DOJ must consent to any private dismissal or settlement of a qui tam action.[94] From a procedural perspective, this power is critically important. Because a relator stands in the shoes of the United States in asserting a claim, any judgment entered for or against her will also bind the government and have preclusive effect on its later assertion of transactionally related claims. Without DOJ oversight, a relator could bargain away government claims, trading a wider liability release for a larger settlement pot.[95]

The third and by far most significant form of oversight authority is the DOJ's ability to intervene in qui tam suits, taking "primary" control over their prosecution.[96] By statute, qui tam relators file their complaints under seal, serving copies on the government. A sixty-day period follows during which DOJ lawyers review and investigate the allegations and decide whether to: (i) terminate or settle the case; (ii) intervene and take control over the litigation, including limiting a relator's procedural

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93. See 31 U.S.C. § 3730(c)(2)(A) ("The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion."); id. § 3730(c)(2)(B) ("The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances."). Note that some courts have interpreted the DOJ's termination and settlement authority as something less than absolute. The Ninth Circuit, for instance, requires that the DOJ show a "rational relation" between dismissal and a valid government purpose. See United States ex rel. Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139, 1145 (9th Cir. 1998); see also United States ex rel. Schweizer v. Océ N.V., 677 F.3d 1228, 1237 (D.C. Cir. 2012) (holding court must examine whether DOJ-imposed settlement was "reasonable"). However, this is a low bar, akin to arbitrary and capricious review under the Administrative Procedure Act.

94. See 31 U.S.C. § 3730(b)(1) ("The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.").

95. See, e.g., Searcy v. Philips Elecs. N. Am. Corp., 117 F.3d 154, 160 (5th Cir. 1997) (noting "danger that a relator can boost the value of settlement by bargaining away claims on behalf of the United States"). DOJ authority to veto settlements is also seen as critical to policing collusive settlements where a relator asserts both FCA and private (typically employment-related) claims and then shifts the allocation of settlement proceeds away from the FCA claims, receiving only a portion of any recovery, and toward the private claims, where she recovers dollar-for-dollar. Id. at 159 (noting risk that relator could "shortchan[ge] the government by settling both a False Claims Act suit and a private wrongful termination suit at the same time and shifting most of the recovery into the wrongful termination settlement in order to reduce the percentage of the overall amount that would ordinarily go to the government").

96. 31 U.S.C. § 3730(c)(1) ("If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action . . . .").

rights; or (iii) decline to intervene and allow the relator to proceed alone.[97] Importantly, the bounty paid to a successful relator turns, at least in part, on the DOJ's case-election decision. If the DOJ elects to decline intervention, a relator may opt to litigate the claim alone and keep 25% to 30% of any recovery as well as attorney's fees and costs.[98] If the DOJ elects to intervene and pursue the action, a relator keeps only 15% to 25% of any recovery, as well as attorney's fees and costs.[99] During legislative debates leading up to the FCA's revival in 1986, this tiered system of relator payoffs was seen as essential to incentivizing relators to go at it alone where a politicized bureaucracy refuses to enforce.[100] Thus, the FCA, while vesting the DOJ with substantial control, also plainly contemplates that relators will play an agency-forcing or anticapture role.

A final set of FCA provisions aims to achieve, as the Supreme Court recently put it, "'the golden mean between adequate incentives for whistle-blowing insiders . . .and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own.'"[101]A pair of provisions jurisdictionally bar claims that mirror a previously filed

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97. See id. § 3730(c)(2)(A)–(B) (setting forth DOJ authority to settle or terminate case out from under relator); id. § 3730(b)(4) (setting forth DOJ's intervention authority, including sixty-day seal period); id. § 3730(c)(2)(C) (authorizing court to "impose limitations on [a relator's] participation" upon government showing "unrestricted participation during the course of the litigation . . . would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment"); id. § 3730(c)(3) (authorizing relator to proceed alone in the event of DOJ declination).

98. Id. § 3730(d)(2).

99. Id.

100. See Beck, supra note 44, at 563–64 (noting congressional concern during debate of 1986 amendments that "political" considerations led to prosecutorial timidity). For concrete examples, see False Claims Act Amendments: Hearings Before the Subcomm. on Admin. Law & Gov't Relations of the H. Comm. on the Judiciary, 99th Cong. 174 (1986) (statement of Rep. Howard Berman) (noting because of institutional and practical constraints, DOJ is unable to bring cases for every act of fraud and "qui tam offers a real potential . . . to provide that prodding, that nudging, that will get the Justice Department into some of these areas"); id. at 326 (statement of Sen. Charles Grassley) (stating "[p]essimism about the likelihood of disclosures leading to results is not surprising" when one considers that more than 2,000 fraud investigations were completed in 1984, "[y]et the Justice Department successfully prosecuted in that same year just 181 cases, including only one against one of the top 100 defense contractor[s]"); Rep. Dan Glickman, False Claims Amendments Act of 1986, H.R. Rep. No. 99-660, at 22–23 (1986) ("[T]he Committee is concerned that there are instances in which the Government knew of the information that was the basis of the qui tam suit, but in which the Government took no action."); 132 Cong. Rec. 22,340 (1986) (statement of Rep. Berkley Bedell) ("[I]n many cases, the authorities will not prosecute for political reasons. . . . [T]he Justice Department has neither the political will nor the resources to always enforce all of the laws.").

101. Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson, 130 S. Ct. 1396, 1406 (2010) (quoting United States ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994)).

qui tam suit[102] or an already-existing government enforcement proceeding.[103] A third provision bars claims that have previously been "public[ly] disclos[ed]" in the press or a government report except where the relator is an "original source"—typically defined as a relator with direct, first-hand knowledge—of the information on which the fraud allegation is based.[104] As noted previously, the Supreme Court has narrowly construed these provisions in a series of decisions over the past five years, including the recent *Schindler Elevator* case.[105] The goal of each of the above provisions is to filter out "parasitic" qui tam suits that do not offer the government information it does not already have or merely piggyback on existing public enforcement efforts. As one court put it, the FCA thus seeks "to encourage insiders privy to a fraud on the government to blow the whistle. . . . [T]here is little point in rewarding a second toot."[106]

B. *The Supply-Side Critique of Qui Tam Enforcement*

Despite the FCA's carefully wrought design, qui tam litigation has quickly become one of the most controversial contemporary litigation regimes, generating a sea of commentary in the academic and popular press but little rigorous empirical study.[107] One flashpoint of debate is

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102. See 31 U.S.C. § 3730(b)(5) ("When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.").

103. Id. § 3730(e)(3) (barring actions "based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding").

104. Id. § 3730(e)(4); see also Schindler Elevator Corp. v. United States ex rel. Kirk, 131 S. Ct. 1885, 1895 n.8 (2011) (noting statutory requirement that relator in publicly disclosed case have "direct and independent knowledge of the information on which the allegations are based"). As noted previously, recent amendments made in connection with the Patient Protection and Affordable Care Act have altered this aspect of the regime, adding that a relator may qualify as an original source if she "materially adds" to publicly disclosed allegations and vesting DOJ with what amounts to a right to veto a court's dismissal on public disclosure or original source grounds. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10104(j)(2), 124 Stat. 119, 901–02 (2010).

105. 131 S. Ct. 1885; see also supra note 17 and accompanying text (describing holding in *Schindler*).

106. Wang v. FMC Corp., 975 F.2d 1412, 1419 (1992).

107. See supra note 83 (cataloguing limited empirical studies of qui tam litigation). The law review literature is particularly vast. Early studies addressed the constitutionality of the qui tam mechanism. See generally, e.g., Richard A. Bales, A Constitutional Defense of Qui Tam, 2001 Wis. L. Rev. 381; James T. Blanch, Note, The Constitutionality of the False Claims Act's Qui Tam Provision, 16 Harv. J.L. & Pub. Pol'y 701 (1993); Evan Caminker, Comment, The Constitutionality of Qui Tam Actions, 99 Yale L.J. 341 (1989); Ara Lovitt, Note, Fight for Your Right to Litigate: Qui Tam, Article II, and the President, 49 Stan. L. Rev. 853 (1997). Other works consider its overall desirability or propose reforms. See generally, e.g., Beck, supra note 4; Fisch, supra note 3; Helmer, supra note 3; William E. Kovacic, The Civil False Claims Act as a Deterrent to Participation in Government Procurement Markets, 6 Supreme Ct. Econ. Rev. 201 (1998) [hereinafter Kovacic, Deterrent]; Kovacic, Whistleblower Bounty Lawsuits, supra note 5; Krause, supra note 5;

whether the DOJ exercises its intervention authority in an even-handed or sensible way—an issue made particularly salient by the fact that nearly all cases the DOJ joins are successful and nearly all cases it declines are not.[108] A second and even more pervasive line of criticism, however, advances what might be called a "supply-side" critique of qui tam enforcement targeting relators and their counsel.

1. *The Role of Relators.* — While qui tam relators are sometimes championed as moralistic heroes courageously fighting corporate malefactors, FCA opponents paint a far less flattering portrait. Qui tam's opponents cast relators as vengeful former employees who use the FCA as leverage in garden-variety employment disputes,[109] or as opportunistic

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John C. Kunich, Qui Tam: White Knight or Trojan Horse, 33 A.F. L. Rev. 31 (1990); Matthew, Moral Hazard, supra note 5; Paul E. McGreal & DeeDee Baba, Applying Coase to Qui Tam Actions Against the States, 77 Notre Dame L. Rev. 87 (2001); Rich, supra note 5; Vickie J. Williams, Dead Men Telling Tales: A Policy-Based Proposal for Survivability of Qui Tam Actions Under the Civil False Claims Act, 83 Neb. L. Rev. 1073 (2005); Broderick, supra note 83; Jonathan T. Brollier, Note, Mutiny of the Bounty: A Moderate Change in the Incentive Structure of Qui Tam Actions Brought Under the False Claims Act, 67 Ohio St. L.J. 693 (2006); Troy D. Chandler, Comment, Lawyer Turned Plaintiff: Law Firms and Lawyers as Relators Under the False Claims Act, 35 Hous. L. Rev. 541 (1998); Lisa Estrada, Case Note, An Assessment of Qui Tam Suits by Corporate Counsel Under the False Claims Act: *United States ex rel. Doe v. X Corp.*, 7 Geo. Mason L. Rev. 163 (1998); Christopher C. Frieden, Comment, Protecting the Government's Interests: Qui Tam Actions Under the False Claims Act and the Government's Right to Veto Settlements of Those Actions, 47 Emory L.J. 1041 (1998); Thomas L. Harris, Note, Alternate Remedies & the False Claims Act: Protecting Qui Tam Relators in Light of Government Intervention and Criminal Prosecution Decisions, 94 Cornell L. Rev. 1293 (2008) [hereinafter Harris, Alternate Remedies]; Landy, supra note 3; Frank LaSalle, Comment, The Civil False Claims Act: The Need for a Heightened Burden of Proof as a Prerequisite for Forfeiture, 28 Akron L. Rev. 497 (1995); Lisa Michelle Phelps, Note, Calling Off the Bounty Hunters: Discrediting the Use of Alleged Anti-Kickback Violations to Support Civil False Claims Actions, 51 Vand. L. Rev. 1003 (1998); Kwok, Private Enforcement, supra note 83.

108. See Engstrom, Public Regulation of Private Enforcement, supra note 22, at 24 (finding 90% of intervened cases achieve imposition, while 90% of declined cases do not).

109. See, e.g., Michael Lawrence Kolis, Comment, Settling for Less: The Department of Justice's Command Performance Under the 1986 False Claims Amendments Act, 7 Admin. L. Rev. Am. U. 409, 441 (1993) ("[M]any qui tam suits are brought by vengeful, disgruntled former employees of government contractors."); Mark Thompson, Stealth Law: Whistleblowers and Their Lawyers Are Maneuvering To Cash in on Military Fraud, Cal. Law., Oct. 1988, at 33, 33–34 (noting DOJ contention that many qui tam suits are based on "disgruntled employee's say-so"); Michael Waldman, Time to Blow the Whistle?, Nat'l L.J., Mar. 25, 1991, at 13, 14 ("Not surprisingly, many of the recent spate of qui tam lawsuits can be traced to disgruntled employees. A disturbing number of recent qui tam actions, for example, have arisen after companies instituted layoffs or terminated unproductive employees."); Neil Weinberg, Envy Engines, Forbes, Mar. 14, 2005, at 94, 94 (quoting prominent defense lawyer describing qui tam lawsuits as "envy engines that bring out competitors, fired office workers, ex-spouses and mischievous patients"). The view that most relators are spurned employees is sometimes coupled with the anecdotal claim that qui tam filings rise during economic downturns. See, e.g., Kovacic, Deterrent, supra note 107, at 233 ("Layoffs have created a large pool of potential relators who have less to risk by way of damaging a relationship with an existing employer, and who may have fewer

profit-seekers who deliberately bypass internal compliance systems in the rush to collect bounties,[110] sit on evidence of wrongdoing to let the meter run on damages before bringing suit,[111] or undercut the giving and receiving of candid legal advice by, in the case of attorney-relators, basing

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inhibitions with respect to experimenting with new theories of CFCA liability."). The allegation that many FCA claims are merely appendages of employment disputes raises particular concern about collusive relator-defendant settlements because of the incentive, noted previously, for relators to shift settlement proceeds away from fraud claims and toward employment-based claims. See, e.g., United States v. Health Possibilities, P.S.C., 207 F.3d 335, 341 (6th Cir. 2000) (noting relator incentives to "manipulate settlements in ways that unfairly enrich them and reduce benefits to the government" by "'coupl[ing] FCA claims with personal claims'" and using "the bait of broad claim preclusion to secure large settlements, while steering any monetary recovery to the personal action" (quoting Searcy v. Philips Elecs. N. Am. Corp., 117 F.3d 154, 160 (5th Cir. 1997))).

110. See, e.g., Kovacic, Whistleblower Bounty Lawsuits, supra note 5, at 1831 (enumerating ways in which qui tam enforcement "can undermine internal compliance mechanisms"); John C. Ruhnka, Edward J. Gac & Heidi Boerstler, Qui Tam Claims: Threat to Voluntary Compliance Programs in Healthcare Organizations, 25 J. Health Pol. Pol'y & L. 283, 284 (2000) ("The qui tam provisions of the FCA have the effect of encouraging employees *not* to report misbillings uncovered in internal compliance programs to their employers for correction, but instead to use such information to file qui tam lawsuits against their employers in order to share in the recoveries to the government."). But see The False Claims Act Correction Act (S. 2041): Strengthening the Government's Most Effective Tool Against Fraud for the 21st Century: Hearing Before the S. Comm. on the Judiciary, 110th Cong. 137 (2008) [hereinafter 2008 Hearings] (statement of John E. Clark, Of Counsel, Goode, Casseb, Jones, Riklin, Choate & Watson, P.C.) ("The clients who were employees of the entities sued have all had one thing in common: before seeking the assistance of a qui tam attorney, each had tried, without success, to get his or her employer to cease its unlawful conduct."); Nat'l Whistleblowers Ctr., supra note 83, at 4 (finding most relators report fraud internally before filing qui tam actions, but using unrepresentative sample based on subsample of published opinions only). Some critics decry in particular the lack of express provisions in the FCA prohibiting awards to private employees with a duty to report fraud, such as in-house lawyers, auditors, and compliance officers. See, e.g., Client Memorandum, Fried, Frank, Harris, Shriver & Jacobson LLP, The SEC's Whistleblower Program: What the SEC Has Learned from the False Claims Act About Avoiding Whistleblower Abuses—and What FCA Enforcement Stands to Learn from the SEC 5 (June 27, 2011) [hereinafter SEC's Whistleblower Program], available at http://www.friedfrank.com/siteFiles/Publications/6.27.2011%20-%20TOC%20Memo%20-%20SECs%20Whistleblower%20Program.pdf (on file with the *Columbia Law Review*).

111. See, e.g., Amal Kumar Naj, General Electric Pleads Guilty, Pays $69 Million to Settle Whistle-Blower Suit, Wall St. J., July 23, 1992, at A2 (discussing DOJ opposition to awarding bounty to relator and allegation that relator's delay in reporting fraud cost government extra $27 million); Richard B. Schmitt, Honesty Pays Off: John Phillips Fosters a Growing Industry of Whistleblowing—Lawyer Helped Strengthen a Law from Civil War, Now Brings in Big Bucks—Defenders and Critics Abound, Wall St. J., Jan. 11, 1995, at A1 (noting allegation that relator and counsel "sat on crucial information to run up costs"). For a theoretical treatment, see Ben Depoorter & Jef De Mot, Whistle Blowing: An Economic Analysis of the False Claims Act, 14 Supreme Ct. Econ. Rev. 135 (2006) (developing formal model suggesting, among other things, FCA creates disincentives for relators to halt fraud at socially optimal point in time). Note, however, that the first-to-file provisions of the FCA make sitting on frauds that might be known to other whistleblowers a risky strategy from the perspective of profit-motivated relators. See supra notes 101–106 and accompanying text (discussing FCA's "first to file" provision).

qui tam suits on information falling within the attorney-client privilege.[112] Another common contention is that profit-motivated relators have little useful information not already known to the government and instead file claims that are "parasitic" on already-existing public investigations or enforcement efforts.[113] Parasitism concerns are teed up most directly in cases brought by government employees who learn of fraud while on the job, and courts and commentators have vigorously disagreed about the propriety of allowing such suits under the FCA.[114]

A further tenet of relator-focused critiques focuses on organizational and entity relators who deploy the FCA to seek a competitive business advantage or to further an ideological or other agenda.[115] Colorful exam-

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112. See Ruhnka et al., supra note 110, at 301 ("The prospect of corporate inside legal counsel or internal audit staff who are charged with discovering misbilling practices filing a qui tam suit against their employer. . . raises serious issues of breach of fiduciary duties, violation of nondisclosure and confidentiality agreements, and violations of accountant-client or attorney-client relationships."); SEC's Whistleblower Program, supra note 110 (criticizing FCA for failing to formally exclude attorneys, auditors, and compliance officers from coverage). For case law examples, compare United States ex rel. Fair Lab. Practices Assocs. v. Quest Diagnostics Inc., No. 05 Civ. 5393 (RPP), 2011 WL 1330542, at *9–*11 (S.D.N.Y. Apr. 5, 2011) (dismissing qui tam suit brought by attorney where some information on which claim was predicated was covered by attorney-client privilege), with X Corp. v. Doe, 805 F. Supp. 1298, 1311–12 (E.D. Va. 1992) (denying preliminary injunction and allowing in-house corporate counsel to use privileged information to bring qui tam case against client).

113. See Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson, 130 S. Ct. 1396, 1406–07 (2010) (noting effort by drafters of 1986 FCA amendments to achieve "'golden mean'" between incentivizing whistleblowers with unique information and discouraging "'opportunistic plaintiffs who have no significant information to contribute of their own'" (quoting United States ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 649 (D.C. Cir. 1994))). Such views have gained credence from a string of high-profile appellate decisions interpreting the FCA's "public disclosure" and "original source" provisions, including the Supreme Court's recent decisions in *Rockwell* and *Schindler Elevator*. See 2008 Hearings, supra note 110, at 3–4 (statement of Sen. Arlen Specter) (discussing recent appellate and Supreme Court decisions regarding FCA); id. at 7–8 (statement of Michael Hertz, Deputy Assistant Att'y Gen. of the United States) (same); id. at 34–35 (statement of John T. Boese, Partner, Fried, Frank, Harris, Shriver & Jacobson LLP) (same).

114. See Kovacic, Deterrent, supra note 107, at 213 ("One of the most contentious standing issues has been whether government employees may bring qui tam suits based on information obtained during their public employment."); see also 2008 Hearings, supra note 110, at 7, 11 (statement of Michael Hertz, Deputy Assistant Att'y Gen. of the United States) (expressing DOJ's opposition to proposed amendments recognizing "the right of Government employee to serve as relators" and suggesting government employees typically have only "secondhand or derivative information" about fraud). For a case law example, see United States ex rel. Biddle v. Bd. of Trs. of the Leland Stanford, Jr. Univ., 161 F.3d 533, 543 (9th Cir. 1998) (holding government employee obligated to alert superiors to wrongdoing by contractor could not "voluntarily" provide information to government for purposes of initiating FCA claim).

115. A common version of the former is the claim that qui tam claims are merely appended to antitrust claims. See SEC's Whistleblower Program, supra note 110, at 2 n.12 ("Other suits that stretch the FCA beyond its intended purpose include suits by business

ples include qui tam suits by a hedge fund against a private equity firm on which it had a large negative bet,[116] a civil rights group against a municipal housing authority alleging violation of federal antidiscrimination provisions,[117] an animal rights organization against a federally funded laboratory using dogs to study cancer,[118] and an anti-abortion group against Planned Parenthood.[119] Further, just as patent law has seen the rise of patent trolls,[120] in recent years qui tam litigation has seen the emergence of companies that self-identify in court filings, to cite just one example, as "engaged in the business . . . of acquiring information re-

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competitors that add qui tam claims to unfair competition claims . . . ."). For a case law example, see United States ex rel. Chapman v. Office of Children & Family Servs., No. 1:04-CV-1505, 2010 WL 610730, at *5 (N.D.N.Y. Feb. 16, 2010) (dismissing FCA claim after contractor's suit alleging antitrust and copyright violations based on same conduct). For case law on the propriety of organizational relators under the statute, see Minn. Ass'n of Nurse Anesthetists v. Allina Health Sys. Corp., 276 F.3d 1032, 1049 (8th Cir. 2002) (addressing question of "organizational relators"); *Quinn*, 14 F.3d at 656 (same). For further discussion, see Emily R.D. Pruisner, Comment, The Extent of a Corporation's Ability to Constitute an Original Source Under the False Claims Act—*Minnesota Ass'n of Nurse Anesthetists v. Allina Health System Corp.*, 87 Minn. L. Rev. 1247, 1288–91 (2003) (concluding courts should not bar organizational relators so long as their members acquired information about fraud while acting in agency capacity for organization).

116. See Carol S. Remond, Greenlight Heads to a Courtroom: In New Tack, Fund Accuses Allied Capital Subsidiary of Bilking Government, Wall St. J., Jan. 29, 2007, at C5 (detailing qui tam suit alleging false claims in connection with loan documents sent to Small Business Administration).

117. See United States ex rel. Anti-Discrimination Ctr. of Metro N.Y., Inc. v. Westchester Cnty., 668 F. Supp. 2d 548, 551, 569 (S.D.N.Y. 2009) (denying summary judgment in case where plaintiffs alleged false claim as result of county's failure to "affirmatively further" fair housing under federal housing law while accepting federal dollars); see also Stephen F. Hayes, Enforcing Civil Rights Obligations Through the False Claims Act, 1 Columbia J. Race & L. 29, 40–45 (2011) (framing case as part of broader effort to use cross-cutting legal mandates to further civil rights); Jan P. Mensz, Note, Citizen Police: Using the Qui Tam Provision of the False Claims Act To Promote Racial and Economic Integration in Housing, 43 U. Mich. J.L. Reform 1137, 1147–48 (2010) (same); Olati Johnson, Beyond the Private Attorney General: Equality Directives in American Law (Columbia Law Sch. Pub. Law & Legal Theory Working Paper Grp., Paper No. 9204, 2012), available at http://lsr.nellco.org/columbia_pllt/9204 (on file with the *Columbia Law Review*) (same).

118. See United States v. Catholic Healthcare W., 445 F.3d 1147, 1148–50 (9th Cir. 2006) (describing case); Eric M. Fraser, Reducing Fraud Against the Government: Using FOIA Disclosures in Qui Tam Litigation, 75 U. Chi. L. Rev. 497, 507–09 (2008) (analyzing case).

119. See Gonzalez v. Planned Parenthood of L.A., No. 05-08818 AHM (FMOx), 2012 WL 2412080 (C.D. Cal. June 26, 2012) (dismissing claims under FCA). For an overview of the case, see Charles Ornstein, Cost of the Pill Inflated? An Official Fired by Planned Parenthood L.A. Sues, Saying the State and Feds Overpaid for Birth Control, L.A. Times, Mar. 8, 2008, at B3 (analyzing case).

120. See supra notes 71–72 and accompanying text (discussing rise of patent trolls and its implications).

garding, and investigating alleged violations of [federal and local] False Claims Acts."[121]

This latter example relates to a final and critically important tenet of the supply-side critique of relators: the claim that an increasing share of qui tam litigation is the work of so-called "professional" relators who lack the traditional insider status of qui tam whistleblowers and instead build cases through information derived from private investigative work targeting present and past company employees or publicly available sources, including FOIA requests made on government agencies.[122] As referenced previously, the Supreme Court's recent *Schindler Elevator* decision waded into this latter type of case, holding that the government's fulfillment of a FOIA request constitutes a "public disclosure" within the meaning of the FCA's jurisdictional bar, thus precluding qui tam suits where the relator does not also have firsthand information about the fraud.[123]

While some laud the investigative efforts of "professional" and "outsider" relators,[124] others suggest that they bring questionable claims or bypass, and thus degrade, internal reporting and governance schemes.[125] One of the more prominent "professionals" is an especially appealing target: Joseph Piacentile, a former practicing physician who previously served prison time for healthcare fraud (a "life-altering experience," he says), has since devoted himself to policing the same conduct

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121. Complaint at 1, United States ex rel. Caryatid, LLC v. Allergan, Inc., No. 1:10-cv-00046 (D.D.C. Jan. 11, 2010); see also False Claims Act Technical Amendments of 1992: Hearing on H.R. 4563 Before the Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary, 102d Cong. 25 (1992) (statement of Stuart M. Gerson, Assistant Att'y Gen. of the United States) (noting 30 of 407 qui tam complaints filed to date had been filed by "same entity and [were] related"); Kevin Outterson, Qui Tam Troll Attacks Allergan, The Incidental Economist (Aug. 4, 2011, 6:44 AM), http://theincidentaleconomist.com/wordpress/qui-tam-troll-attacks-allergan/ (on file with the *Columbia Law Review*) (referring to "qui tam trolls").

122. See 2008 Hearings, supra note 110, at 90 (statement of John T. Boese, Partner, Fried, Frank, Harris, Shriver & Jacobson LLP) (noting qui tam structure incentivizes "opportunistic bounty-hunters masquerading as whistleblowers"); Schindler Brief, supra note 5, at 3 ("The FCA's relaxed intent standard, harsh treble and per-claim damages specifications, and fee-shifting provision have combined to produce an expansive cottage industry of bounty-seeking relators."); Kolz, supra note 5, at 32 (noting some professional relators obtain information by "[p]osing as a prospective employer or business partner").

123. Schindler Elevator Corp. v. United States ex rel. Kirk, 131 S. Ct. 1885, 1889 (2011).

124. See, e.g., 145 Cong. Rec. 1547 (1999) (statement of Rep. Howard Berman) ("We believe that a realtor [sic] who uses their education, training, experience, or talent to uncover a fraudulent scheme from publicly available documents, should be allowed to file a qui tam action.").

125. Matthew, Moral Hazard, supra note 5, at 316–19 (criticizing "professional qui tam relators" as likely to file suit rather than "effect change" within organizations); id. at 333 ("Overly lucrative financial incentives invite questionable plaintiff practices such as the plaintiffs who appear repeatedly in qui tam cases or plaintiffs who accept employment for short periods of time before their employer becomes a target defendant.").

that landed him in jail, filing more than a dozen qui tam lawsuits and recovering more than $100 million for the United States and more than $15 million for himself.[126]

Other "professional" relators offer a glimpse of the potentially profound role played by expertise and specialization in the qui tam regime. One is Harrold Wright, a now-deceased "independent" Texas oilman who was never employed by any of the major oil and gas companies.[127] While he thus lacked "insider" status in FCA terms, he brought a series of qui tam suits against the industry alleging fraudulent underpayment of royalties for extraction of oil and gas from federal lands.[128] At last count, those suits had netted settlements totaling $386 million.[129]

An even stronger example is Ven-A-Care, a former Florida pharmacy that has since turned full-time to using its detailed knowledge of Medicare and Medicaid reimbursement practices to bring a series of large scale qui tam suits targeting pharmaceutical companies, returning an eye-popping $2.1 billion to the federal treasury and collecting nearly $500 million as relator share for its efforts.[130] The Ven-A-Care example also offers a window into the complex public-private nexus in qui tam litigation. Ven-A-Care lawyers have reportedly provided extensive assistance to public prosecutors in developing winning strategies in complex

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126. See Kolz, supra note 5, at 30 (recounting qui tam litigation victories of Piacentile and asking, "Should the statute, and its potentially handsome monetary awards, embrace professional plaintiffs, alongside more traditional whistle-blowers who often risk careers and livelihoods to expose corporate fraud?").

127. See, e.g., Complaint at 1–3, United States ex rel. Wright v. AGIP, No. 5:03-264 (E.D. Tex. Feb. 3, 1998) (describing qui tam suit against Mobil, Burlington, and their subsidiaries).

128. Id. at 2–3.

129. These figures are taken from data provided by the DOJ, described in Part III. See infra Part III.A.

130. These numbers are once more drawn from data provided by the DOJ, as described in Part III. See infra Part III.A. For secondary accounts of Ven-A-Care litigation efforts, see David Bario, A Whistleblower and Its "Pit Bull," Nat'l L.J., Feb. 7, 2011, at 1 (noting Ven-A-Care won $766 million Medicare and Medicaid fraud settlements and its share was $155 million); Thomas Catan, Drug Firms Agree to Pay $421 Million to Settle U.S. Claims that They Bilked Federal Health-Care Programs Out of Millions by Greatly Inflating the Price of Their Drugs, Wall St. J., Dec. 8, 2010, at B4 (noting Ven-A-Care initiated suit against three drug makers, resulting in $421 settlement of which Ven-A-Care will receive $88.4 million); David S. Cloud & Laura McGinley, Medicare Monitor: How a Whistle-Blower Spurred Pricing Case Involving Drug Makers—High Reimbursement Caught Eye Of Home-Care Business Newcomer, Wall St. J., May 12, 2000, at A1 (chronicling how Ven-A-Care evolved from pharmacy to whisleblower that "ferret[ed] out Medicare and Medicaid fraud" and eventually spurred government authorities to investigate pharmaceutical companies and pressure them into settlement); Thomas Catan, Cha-Ching! Payouts Continue for Four Florida Whistleblowers, Wall St. J. Law Blog (Dec. 8, 2010, 4:10 PM), http://blogs.wsj.com/law/2010/12/08/cha-ching-payouts-continue-for-four-florida-whistleblowers/ (on file with the *Columbia Law Review*) (discussing how Ven-A-Care has "brought suit after suit under the qui tam provisions" and has "helped recover more than $2 billion for the U.S. government").

national litigations.[131] And Ven-A-Care is widely credited with developing one of the more successful types of FCA claims targeting healthcare fraud—that pharmaceutical companies have manipulated "average wholesale prices" to fraudulently boost government reimbursement rates—and, according to some, had to convince an initially wary DOJ to go along with the claims.[132]

2. *The Role of Relator Counsel.* — The other half of the supply-side critique centers not on relators, but rather on an increasingly sophisticated and specialized qui tam relators' bar. At present, several dozen law firms—and, according to various estimates, roughly 200 lawyers[133]—advertise that they do mostly, or exclusively, relator-side representations or even particular types of FCA claims, such as healthcare fraud.[134] Qui tam practice is increasingly national in scope, and competition for market share is fierce.[135] Most relator-side practice

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131. See Bario, supra note 130, at 5 (quoting Ven-A-Care lawyer describing assistance as "assembling teams of private lawyers, training the AGs, assisting them in the nuts and bolts of how to develop strategy for complex national litigation"); id. at 4 (noting Ven-A-Care's "detailed knowledge of the industry, access to drug-pricing data and, by all accounts, plenty of outrage").

132. Interview with Former Assistant Dir., Civil Fraud Section, U.S. Dep't of Justice, Washington, D.C. (Mar. 10, 2011) (on file with the *Columbia Law Review*); Interview with Former Attorney, Civil Fraud Section, U.S. Dep't of Justice (June 13, 2012) (on file with the *Columbia Law Review*).

133. See, e.g., Neil Weinberg, The Dark Side of Whistleblowing, Forbes, Mar. 14, 2005, at 90, 91 [hereinafter Weinberg, Dark Side] (noting "whistleblower bar now spans some 200 lawyers").

134. See, e.g., Bothwell & Bracker, http://www.bothwelllaw.com/ (on file with the *Columbia Law Review*) (last visited Aug. 21, 2012) ("Exclusively Representing Qui Tam Relator Whistleblowers Since 1996"); Helmer, Martins, Rice & Popham Co., L.P.A., http://www.fcalawfirm.com/ (on file with the *Columbia Law Review*) (last visited Aug. 21, 2012) ("The False Claims Act is a primary focus of our litigation and appellate practice. In fact, we wrote the book."); Kenney & McCafferty, http://quitam-lawyer.com/ (on file with the *Columbia Law Review*) (last visited Aug. 21, 2012) ("Our firm focuses exclusively on whistleblower cases."); Nolan & Auerbach, P.A., http://www.whistleblowerfirm.com/ (on file with the *Columbia Law Review*) (last visited Aug. 21, 2012) ("We are the most successful qui tam law firm exclusively limited to healthcare fraud under the False Claims Act.").

135. Many relator-side firms maintain multiple offices around the country and have developed elaborate internet presences, including traditional firm websites that trumpet past FCA wins as well as separate websites that purport to provide objective information about the FCA but then direct visitors in search of counsel to the firm's main website. See, e.g., Kenney & McCafferty, supra note 134 (providing "Track Record of Success" list of firm's previous FCA recovery amounts); Nolan & Auerbach, P.A., supra note 134 (providing list of firm's previous FCA recovery amounts); Phillips & Cohen LLP, http://www.phillipsandcohen.com/ (on file with the *Columbia Law Review*) (last visited Aug. 21, 2012) (providing list of firm's "record-setting settlements" in whistleblower cases); Qui Tam Help, http://quitamhelp.com/ (on file with the *Columbia Law Review*) (last visited Aug. 21, 2012) (presenting informational links, such as "Facts You Should Know About Qui Tam," but indicating website is "sponsored by" Getnick & Getnick law firm, giving link to firm website, and showing news articles about firm's recoveries in qui tam cases); Qui Tam Online Network, http://www.quitamonline.com/ (on file with the

proceeds on a contingent fee basis, with the lawyer's cut often set at 40%.[136]

The emergence of an organized relators' bar has stoked debate about specialization's value. Champions applaud the FCA's leveraging of "entrepreneurial legal talent" and credit the FCA's hybrid public-private structure, and the seemingly powerful role played by DOJ intervention, as "demand[ing] and reward[ing] top-quality [legal] work," while simultaneously "discourag[ing] inexperienced or unskilled counsel" from initiating cases.[137] Others tout the ability of specialized counsel to screen claims and ensure alignment of private enforcement efforts and public enforcement priorities through close ties with the DOJ and U.S. Attorney's Offices.[138] For this reason, some predict a general leveling off of qui tam filing volume as repeat players develop regime-specific expertise and more regularized communication channels with public enforcers.[139]

Columbia Law Review) (last visited Aug. 21, 2012) (labeling itself as "your source for False Claims Act & Whistleblower information" and describing itself as "a network of attorneys who have recovered over $150 million in taxpayers' money"); Vogel, Slade & Goldstein, http://vsg-law.com/ (on file with the *Columbia Law Review*) (last visited Aug. 21, 2012) (providing scrolling list of FCA wins and settlements and stating firm has "handled over one hundred False Claims Act cases in 21 states with cumulative recoveries exceeding a half-billion dollars"); Warren Benson Law Group, http://www.warrenbensonlaw.com/ (on file with the *Columbia Law Review*) (last visited Aug. 21, 2012) (stating firm "has prosecuted qui tam cases in more than 30 states," and listing previous settlement amounts in FCA cases).

136. Interview with Relator Counsel, San Francisco, Cal. (Oct. 7, 2010) (on file with the *Columbia Law Review*); see also Bario, supra note 130, at 4 ("According to qui tam lawyers, whistleblower firms typically take home a 40% contingent fee when their clients are successful.").

137. Bucy, Private Justice, supra note 3, at 8, 53, 58; see also Mitchell R. Kreindler, So You Wanna Be a Whistleblower's Lawyer? (unpublished manuscript), quoted in Pamela H. Bucy, Game Theory and the Civil False Claims Act: Iterated Games and Close-Knit Groups, 35 Loy. U. Chi. L.J. 1021, 1032 n.75 (2004) ("If you can develop a reputation for bringing meritorious cases, the reception you receive from the government will be far different . . . . The quality of case selection may be the most important attribute of a successful qui tam attorney.").

138. See 2008 Hearings, supra note 110, at 27 (testimony of Judge John Clark) (noting qui tam relator counsel "choose their cases carefully and always try to choose cases that the Government will like and intervene in"); see also Schmitt, supra note 111, at A1 (noting managing partner at leading qui tam relator's firm "prides himself on identifying winners" and citing him for proposition that "[t]he heart of this is screening cases"). A former Assistant U.S. Attorney who specialized in FCA matters recommends that relators or their counsel contact relevant U.S. Attorney's offices prior to filing a complaint. Kathleen McDermott, Qui Tam: An AUSA's Perspective, False Claims Act & Qui Tam Q. Rev., Oct. 1997, at 20, 22, available at http://www.taf.org/PDF/oct97qr.pdf (on file with the *Columbia Law Review*).

139. See Harris, Alternate Remedies, supra note 107, at 1302 (2009) ("One reason why the number of qui tam suits filed each year may not continue to increase is that attorneys litigating these types of suits have increased in number and expertise.").

Qui tam's critics, by contrast, complain that qui tam litigation is too lawyer-driven.[140] Courts and commentators accuse the organized relators' bar of "trolling for unhappy company employees to serve as whistleblowing relators."[141] Similarly, while champions claim that the FCA encourages "high-quality [legal] work," others suggest just the opposite, that the FCA's first-to-file provision—designed to quell parasitic lawsuits—incentivizes "bare bones" or "haphazard" claims.[142] According to this view, the

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140. The rent-seeking-lawyer critique, long a staple of litigation critics across a range of substantive legal areas, runs particularly deep in the qui tam context. Many accounts of the FCA's 1986 revival highlight the work of then-public-interest lawyer John Phillips, who helped draft legislative amendments and then proceeded to build a successful private law firm that specializes in qui tam litigation. See Lucette Lagnado, A Lawyer for Whistleblowers: "Part Therapist," Wall St. J., Jan. 7, 1999, at A13 (noting Phillips was "instrumental" in FCA's revival); Schmitt, supra note 111 (profiling Phillips' rise to nation's "premier whistle-blower attorney" and noting criticisms of generous whistleblower lawyers' fees authorized by FCA provisions Phillips helped draft); Weinberg, Dark Side, supra note 133, at 92 (asserting 1986 amendments to FCA were pushed by Phillips, then of Center for Law in the Public Interest, now of Phillips & Cohen, who then launched lucrative practice for whistleblower cases).

141. Antonia F. Giuliana, Supreme Court to Decide Whether FOIA Response Is a Public Disclosure Under the FCA (Part II of II) (March 8, 2011), FCA Alert, http://www.fcaalert.com/2011/03/articles/supreme-court-to-decide-whether-foia-response-is-a-public-disclosure-under-the-fca-part-ii-of-ii/ (on file with the *Columbia Law Review*). See, e.g., United States ex rel. Lopez v. Strayer Educ. Inc., 698 F. Supp. 2d 633, 641–44 (E.D. Va. 2010) (decrying relator counsel recruitment of disgruntled former employees to file qui tam suits); 2008 Hearings, supra note 110, at 23–24 (statement of John T. Boese, Partner, Fried, Frank, Harris, Shriver & Jacobson LLP) (asserting qui tam enforcement has been abused by plaintiffs' bar); Schindler Brief, supra note 5, at 9 (explaining "[t]he potential for lucrative awards has resulted not only in a cottage industry of relators; it has produced a de facto 'relators' bar' of attorneys in regular pursuit of qui tam plaintiffs" and suggesting organized relators' bar finds clients by "trolling for unhappy company employees to serve as relators"); Kolis, supra note 109, at 441 ("Many lawyers have begun to devote their practices to locating potential relators to help them allege False Claims Act violations."); Schmitt, supra note 111, at A1 (suggesting top qui tam relator firms have become "clearinghouse for people tattling on their employers"). A related claim is that qui tam litigation results from "attorneys and law firms who discover fraud in the course of representing clients in other matters." Bucy, Private Justice, supra note 3, at 49 n.280 (citing John T. Boese, Civil False Claims and Qui Tam Actions 4.01[B] (2001)). See generally Charles G. Hardin, Boston Bounty Hunters, Am. Spectator (July 14, 2005, 12:05 AM), http://spectator.org/archives/2005/07/14/boston-bounty-hunters (on file with the *Columbia Law Review*) ("Needless to say, the law firms specializing in FCA cases are cleaning up financially.").

142. Kolis, supra note 109, at 452; see also False Claims Act Implementation: Hearing Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary, 101st Cong. 21 (1990) (statement of Stuart Gerson, Assistant Att'y Gen. of the United States) (stating many relators file haphazard claims to ensure theirs is first filed but have no intention of contributing to litigation and are content "to sit back and pick up their check at the end"); U.S. Chamber Inst. for Legal Reform, Preventing Government Overpayments to Qui Tam Plaintiffs: Proposed Amendments to the False Claims Act 15 (2011), available at http://www.instituteforlegalreform.com/sites/default/files/Proposed_Amendments_to_the_False_Claims_Act.pdf (on file with the *Columbia Law Review*) (arguing FCA's "'first to file' provision" disincentivizes "internal reporting" and instead

organized qui tam relators' bar—or some segment of it—might rationally choose to become "filing mills," bringing large volumes of qui tam claims with an eye to preserving a right to a portion of an eventual recovery by the government, but with no intention of assisting the DOJ upon intervention or proceeding at all upon DOJ declination.[143]

Similarly, while qui tam's defenders tout the organized relator bar's deepening capacity to target larger and more sophisticated frauds,[144] critics instead blame specialized qui tam lawyers for their role in developing and asserting so-called "certification" claims. These are claims in which a relator alleges that a federal funding recipient falsely made an express or implied certification of compliance with a separate statutory or regulatory command as a condition of receiving federal funds, rendering "false" any claim made for that funding.[145] Certification claims, as one colorful account in a recent Supreme Court amicus brief put it, are part of a "relentless drive" by qui tam lawyers to convert regulatory noncompliance into actionable fraud, even where infractions are minor or technical, and even where the separate statute or regulation does not itself provide for a private right of action.[146]

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promotes a "race to the courthouse"). See generally William M. Landes & Richard A. Posner, The Private Enforcement of Law, 4 J. Legal Stud. 1, 34 (1975) (noting possibility "first-come first-served system" would incentivize private enforcers to "spend their time drafting and filing barebones complaints charging large corporations with violations of various laws" in order to preserve those claims and potentially sell them on claims market).

143. See 2008 Hearings, supra note 110, at 84 (statement of John T. Boese, Partner, Fried, Frank, Harris, Shriver & Jacobson LLP) (noting "lottery-like aspect of the existing system" and suggesting overly generous bounties incentivize enforcers seeking a "Lotto payoff"); Weinberg, Dark Side, supra note 132, at 91 (warning of relator bar pursuit of "jackpot justice"); Kwok, Deterrence, supra note 83, at 16, 18–20 (noting "[f]irms pursuing a filing mill strategy . . . combin[ed] a high volume of cases with a lower intervention rate" and that in some cases it is "possible that the mere threat of dismissal exerts a deterrent effect on relators").

144. See, e.g., Rich, supra note 5, at 1248 (asserting "healthcare qui tam actions have become more complex and target more sophisticated fraud").

145. See Gregory Klass & Michael Holt, Implied Certification Under the False Claims Act, Pub. Cont. L.J., Fall 2011, at 1–2 (describing claims); Michael Murray, Seeking More Scienter: The Effect of False Claims Act Interpretations, 117 Yale L.J. 981, 981 (2008) (same).

146. Schindler Brief, supra note 5, at 17, 19 ("Implied and express 'false certification' theories have become the theories du jour of the relators' bar."); see also Dayna Bowen Matthew, An Economic Model to Analyze the Impact of False Claims Act Cases on Access to Healthcare for the Elderly, Disabled, Rural and Inner-City Poor, 27 Am. J.L. & Med. 439, 447 (2001) (noting tethering of FCA to federal antikickback statutes that did not include private rights of action); Krause, supra note 5, at 1383 ("Recently, prosecutors and qui tam relators have sought to style various forms of regulatory noncompliance as actionable fraud."); Matthew, Moral Hazard, supra note 5, at 330 ("[A]ccommodating questionable qui tam plaintiffs, who advanced theories of recovery concerning small and contestable regulatory points . . . replaces thoughtful, flexible, and appropriate regulatory authority with a privately-driven system of penalizing a range of non-fraudulent conduct, as though it were true fraud.").

A final tenet of the supply-side critique taps into longstanding concerns about clientelism between public and private enforcers in private enforcement regimes. Just as relator-side firm websites tout their specialization in qui tam enforcement, they also frequently note the past experience of firm lawyers and staff prosecuting fraud at DOJ or other relevant government agencies.[147] Such claims have fueled the contention that qui tam's revival has spurred development of an organized relators' bar "made up of former Justice Department lawyers who litigated False Claims Act cases for the government" and so are especially effective at "enticing" the DOJ to intervene in cases.[148] According to this account, a steadily turning "revolving door" is at least in part to blame for qui tam's explosive growth.[149]

C. *Reform Proposals*

It should come as no surprise that the above criticisms have spawned a host of reform proposals designed to mitigate perceived overenforcement and reduce the "supply" of qui tam litigation. The most common proposal, which gained at least some traction in recent congressional debate, would cap relator awards as a way to decrease total litigation volume.[150] Other proposals include the usual line-up of general litigation

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147. See, e.g., Managing Your Qui Tam Claim, James, Hoyer, http://www.jameshoyer.com/whistleblowers-qui-tam/managing-your-qui-tam-claim/ (on file with the *Columbia Law Review*) (last visited Aug. 22, 2012) ("Because our attorneys formerly prosecuted for the government, they know how to present a case in a way that maximizes impact and attention."); McInnis Law, http://www.whistleblowerlegal.com/ (on file with the *Columbia Law Review*) (last visited Aug. 22, 2012) ("Led by former federal prosecutor and experienced civil litigator Timothy McInnis . . . ."); Nolan & Auerbach, P.A., supra note 134 ("We have huge resources with a deep infrastructure. Our team includes former federal prosecutors, DOJ, CMS and FBI employees."); Vogel, Slade & Goldstein, supra note 135 (heralding attorneys as "former U.S. Department of Justice prosecutors with over 50 years combined experience combating fraud on the government").

148. Efrem M. Grail, "Qui Tam" Insurance & False Claims Act Settlements, 11 Health Law. 16, 17 (1998).

149. See generally Kay Lehman Schlozman & John T. Tierney, Organized Interests and American Democracy 342 (1986) (analyzing "revolving door" theories of regulatory capture); Yeon-Koo Che, Revolving Doors and the Optimal Tolerance for Agency Collusion, 26 RAND J. Econ. 378 (1995) (same).

150. See 155 Cong. Rec. 10277–28 (2009) (discussing various amendments to Fraud Enforcement and Recovery Act that would cap relator awards); id. at 10508–13, 10516 (same); id. at 10517 (recording Senate roll call vote rejecting proposed amendment capping relator awards at $50 million). For broader commentary, see Loucks, supra note 5, at 3; see also Bryan Terry, Note, Private Attorneys General v. "War Profiteers": Applying the False Claims Act to Private Security Contractors in Iraq, 30 Seattle U. L. Rev. 809, 843 n.198 (2007) (detailing letter from seven healthcare providers asking Congress to cap whistleblower awards under FCA at $1 million); Ross Kerber, Has Time Come to Cap Whistleblower Awards?, Ins. J. (Mar. 8, 2011), available at http://www.insurancejournal.com/news/national/2011/03/08/189299.htm (on file with the *Columbia Law Review*) (citing record number of qui tam cases filed in fiscal year 2010); Richard W. Stevenson, A Necessary Reward? Whistleblower Collects $7.5 Million for His Tip, N.Y. Times, July 19,

reforms and also some FCA-specific ones: raising pleading and/or scienter requirements;[151] eliminating joint and several liability;[152] imposing reverse fee-shifts (or "loser pays" rules) where the DOJ declines to intervene;[153] fortifying sanctions for frivolous claims;[154] limiting qui tam actions to carefully denominated categories of conduct;[155] pegging relator shares to insider or outsider status;[156] and preventing relators from proceeding with non-intervened actions entirely.[157] What unites this menu of reform proposals, however, is a lack of even the most rudimentary empirical understanding of the nature and shape of the qui tam regime. The next Part begins the process of bringing needed empirical clarity to the qui tam regime by offering some preliminary evidence on qui tam enforcement efforts since 1986, with particular emphasis on supply-side concerns.

III. TESTING THE SUPPLY-SIDE CRITIQUE: EMPIRICAL ANALYSIS OF QUI TAM LITIGATION SINCE 1986

Moving beyond anecdote demands a more systematic approach. This Part offers an empirical assessment of some of the issues raised, and assertions made, about qui tam enforcement since the modern FCA came into being in 1986. The analysis focuses on three main questions: What role have specialized enforcers—including repeat relators, the

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1992, at E2 (noting growing number of whistleblowers claiming multimillion dollar rewards is "sharpening the debate over whether the Government should pay people for evidence of fraud" and questioning whether increasingly large qui tam rewards are necessary); U.S. Chamber Inst. for Legal Reform, supra note 142, at 4–5 (proposing $15 million cap on relator awards);

151. Bucy, Private Justice, supra note 3, at 74–75; see also Kovacic, Deterrent, supra note 107, at 236 (advocating restoration of commercial fraud standard for FCA claims).

152. Bucy, Private Justice, supra note 3, at 75.

153. Kovacic, Deterrent, supra note 107, at 238.

154. Bucy, Private Justice, supra note 3, at 75.

155. Kovacic, Deterrent, supra note 107, at 237 (advocating delimiting "categories of conduct that qui tam relators can attack"); Dayna Bowen Matthew, Tainted Prosecution of Tainted Claims: The Law, Economics, and Ethics of Fighting Medical Fraud Under the Civil False Claims Act, 76 Ind. L.J. 525, 580 (2001) (advocating preclusion of kickback and self-referral claims); see also Broderick, supra note 82, at 986 (demonstrating advantages of limiting FCA to "medical assistance claims").

156. See Kesselheim, Whistle-blowers' Experiences, supra note 83, at 1838 (noting greater toll on "insider" relators and proposing "[m]ore sophisticated approaches to determining relators' recoveries").

157. See, e.g., Beck, supra note 4, at 638–40 (arguing elimination of informer's right to proceed with declined cases would decrease abuses of qui tam litigation). Note that this proposal would convert the FCA into a pure whistleblower regime in which whistleblowers receive bounties for relating information to public enforcers that lead to recoveries but play no independent enforcement role. See also Matthew, Moral Hazard, supra note 107, at 334 (proposing DOJ be required "to either join or move to dismiss each qui tam case within a certain statutory time period").

organized qui tam relators' bar, and former DOJ insiders—played in the qui tam regime? Do specialized enforcers serve an agency-forcing role, or is there evidence of clientelism and capture? And how, if at all, has the role of enforcer specialization changed over time?

A. *Data Overview*

To shed light on these questions, data were assembled from two main sources. First, information on the more than 4,000 unsealed qui tam lawsuits filed since 1986 was obtained via a FOIA request served on the DOJ, including, among other things, judicial district, filing dates, DOJ case election dates and decisions, and case outcomes (including the amount of any imposition and relator share), as maintained by DOJ on its internal tracking system (QTRACK). Note, however, that roughly 3,000 qui tam suits remain under seal and are not part of the dataset, raising questions about the representativeness of the data sample.[158] Second, electronic docket sheets were retrieved for each case and infor-

158. These sealed cases likely fall into several categories. First, a substantial portion of the 3,000 cases were filed in the past five years and remain under seal pending the completion of DOJ investigations. It is therefore sometimes important, as noted at points in the empirical analysis presented herein, to run statistical analyses constraining the sample to cases filed before, say, 2008, since a nontrivial number of cases filed after that year are unobservable because they have not yet drawn a DOJ case-election decision and so remain under seal. See infra note 204. Second, a very small fraction of the 3,000 cases are closed cases subject to various privileges, including the state secrets privilege, perhaps because the case implicates national security concerns. The rest of the 3,000 cases are, according to present and former DOJ attorneys, likely closed cases that remained sealed for a variety of reasons, including simple neglect by the judge to unseal the case, accidental failure by the relevant DOJ attorney to request unsealing upon case termination, or a successful relator effort to persuade the trial judge to keep the case sealed, typically because the relator remains employed by the defendant company. Some interviewees suggested that the latter type of case is likely to be concentrated in the period before 2000 or 2001 when the DOJ, under pressure from congressional overseers, apparently changed its policy and began to take a more aggressive stance in advocating unsealing of any terminated case. Interview with Former Attorney, supra note 132; Interview with Relator Counsel, supra note 136. Before that, the likelihood that a case would remain sealed likely reflected the idiosyncratic approaches of specific U.S. Attorney offices as opposed to particular case attributes. Id. In sum, the sample used in this Article is likely unrepresentative in at least two respects, containing more interventions than the full qui tam case population since 1986, and also more cases brought by former, as opposed to current, company employees. However, the precise impact of all of this on the relative measures of relator and counsel success presented herein remains unclear. For instance, it is possible that more experienced counsel are not just more capable case litigators but also better at persuading courts not to unseal an unsuccessful case. If true, excluding cases from the sample that produced litigation could upwardly bias estimates of returns to specialization by systematically underestimating the number of losing cases by these more experienced counsel.

mation extracted regarding the parties, law firms, and individual lawyers involved.[159]

These data were then supplemented in three ways. First, to assess "revolving door" dynamics, lawyers were identified who served as relator counsel in a sample case and also previously represented the government in a qui tam case, whether at the DOJ or a regional U.S. Attorney's Office. Second, case file materials were sought for a random sample of 500 cases and then used to assemble a hand-coded data set with a more fine-grained accounting of relator characteristics and case outcomes. Finally, two dozen open-ended interviews were conducted with plaintiff- and defense-side qui tam lawyers and present and past attorneys at the DOJ's Civil Fraud Section and U.S. Attorney's Offices in an effort to gain a richer and more nuanced understanding of the qui tam regime.

B. *Quantifying the Expertise and Specialization Advantage*

The empirical analysis begins by quantifying returns to expertise and specialization within the qui tam regime. Subsections 1 through 3 present descriptive evidence on the extent of any such advantage as enjoyed by relators, relator counsel, or former DOJ insiders, respectively, along a number of key litigation outcome measures. Subsection 4 then provides a multivariate regression estimate of those same outcomes for all three enforcer types, controlling for other possible determinants of litigation success.

1. *Descriptive Findings*: *Relators*. — Table 1 captures the litigation success rates of repeat and non-repeat plaintiff-relators in qui tam actions between 1986 and 2011. Two broad findings stand out. First, over the study period, repeat relators, defined as relators who filed more than one qui tam suit, accounted for roughly 16% of qui tam filings (704 out of 4,326). More than one third of these (265 of the 704) came from so-called "Super" or "Heavy" repeat relators, each of whom filed four or more qui tam actions over the study period.

159. Information from the docket sheets was "scraped" using a script written in the "Perl" programming language. See generally The Perl Programming Language, http://www.perl.org/ (on file with the *Columbia Law Review*) (last visited Aug. 22, 2012) (explaining programming language).

TABLE 1: LITIGATION SUCCESS RATES BY REPEAT RELATOR STATUS IN QUI TAM CASES, 1986–2011

Relator "Tier"	*Case Tally*	*DOJ Intervene Rate*	*Imposition Rate*	*Mean/Median Imposition Dollars, Winning Cases*	*Mean Imposition Dollars, All Cases*
"Super" Repeat Relators (10–23 filings)	86	30.2%	33.8%	$42.1/$15.5	$14.2
"Heavy" Repeat Relators (4–9 filings)	179	22.3%	22.0%	$48.8/$3.6	$10.7
"Regular" Repeat Relators (2–3 filings)	439	24.8%	28.5%	$38.3/$2.1	$10.9
"One-Shot" Relators (1 filing)	3,622	28.5%	35.1%	$13.8/$1.3	$4.8
All Relators	4,326	27.9%	33.8%	$17.5/$1.4	$5.9
Pearson chi^2 / ANOVA (P-value)	—	5.7233 (*p=0.126*)	17.2066 (*p=0.001*)	9.48 (*p=0.000*)	5.24 (*p=0.001*)

Notes: "Case Tally" includes all unsealed cases that had drawn a DOJ election decision as of January 1, 2012. Results for "DOJ Intervene Rate" were calculated using "Case Tally" as the denominator. Results for "Imposition Rate" and "Mean Imposition Dollars, All Cases" were calculated using unsealed, terminated (closed) cases as of January 1, 2012 (n=3,817) and, for dollar calculations, by assigning zeroes to closed cases that did not yield impositions. Mean and median impositions in the fifth column ("Mean/Median Imposition Dollars, Winning Cases") include only cases that generated an imposition—i.e., successful cases (n=1,291). All imposition amounts are reported in millions of 2011 dollars. P-values were calculated using chi-square (intervention and imposition rates) or ANOVA (per-win mean/median and per-filing mean impositions) tests.

A second finding is that repeat relators appear to achieve litigation outcomes that are, by and large, superior to those achieved by one-shotters. To be sure, repeat relator outcomes are not uniformly better: Repeat relators as a group win DOJ intervention and impositions less consistently than do one-shot relators.[160] But repeat relators also win

160. Collapsing Table 1's relator categories into two categories, those who filed more than one case over the study period and those who did not, helps underscore the difference: As a group, repeat relators win DOJ intervention 24.8% of the time, compared

significantly larger impositions than one-shotters when they succeed, offsetting the lower success rates. Indeed, Table 1's final column shows that repeat relators are more "efficient" than one-shotters, achieving average impositions per filing that are roughly twice that achieved by one-shotters.[161] Taken together, these results provide little facial support for the claim that repeat or "professional" relators bring systematically less meritorious claims or are otherwise a net drag on the qui tam system.

Before arriving at a firm conclusion to this effect, however, some measurement complexities warrant mention. First, the allocation of relators in Table 1 to the "Super," "Heavy," "Regular," and "One-Shot" bins is retrospective in approach. Thus, *all* of a relator's twenty cases are treated as "Super," from her first to her twentieth case. This approach thus assumes that relators develop a plan or business model ex ante, making a deliberate decision to specialize in qui tam enforcement efforts. An alternative approach would include a case in the "Super" category if it was a relator's tenth filing, while allocating the previous case filed by that same relator—her ninth—to the "Heavy" category. The result would be a rolling, case-by-case measure of a relator's accumulated experience at the time of each filing. Adopting this approach, however, does not materially alter Table 1's results.[162]

The other measurement issue is how to allocate cases and outcomes as between relators who file a single omnibus complaint against multiple defendants alleging a common fraudulent scheme and relators who instead initiate the same case by way of multiple separate lawsuits in the

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to the reported 28.5% intervention rate for one-shotters, with the difference statistically significant at the 10% level using a simple t-test (p=0.08). The same is true for impositions: As a group, repeat relators achieve impositions 27.5% of the time compared to one-shotters' reported 35.1% imposition rate (p=0.000). Nor do repeat relators appear to get better with time: Dividing the data into cases brought by first-time relators and relators bringing subsequent qui tam suits after having filed an initial suit reveals that relators with at least one qui tam suit under their belt win DOJ intervention 20.2% of the time compared to a 28.9% intervention rate for first-time filers (p=0.000). Similarly, relators with at least one filing behind them achieve impositions only 23.4% of the time, while first-time filers do so 35.2% of the time (p=0.000).

161. Collapsing the repeat-relator categories into experienced and one-shot relators once more underscores the difference: Repeat relators (defined once more as any relator who filed more than one case over the study period) achieve per-win mean impositions of $40.9 million versus $13.8 million for one-shotters (p=0.000) and per-filing mean impositions of $113 million versus $4.8 million ($p$=0.000). Similarly, relators with at least one filing behind them achieve per-win mean impositions of $56.6 million versus $15.7 million for first-time filers (p=0.000) and per-filing mean impositions of $13.2 million versus $5.5 million ($p$=0.001).

162. As an example, when a rolling measure of relator experience is used, the intervention rates of Super, Heavy, and Regular relators drops to roughly 22–24%, with first-filer relators experiencing a slightly elevated intervention rate of roughly 29%. The same pattern holds for imposition success, with Super, Heavy, and Regular relators achieving imposition success roughly 25% of the time and first-filer relators achieving impositions roughly 36% of the time.

same or different district courts. One approach would be to take relators' filing decisions as is. Doing so, however, may give undue weight to cases based on procedural barriers in particular cases, such as the difficulty of establishing personal jurisdiction over all defendants in a single district court, or the idiosyncratic filing preferences of relators or their counsel. An alternative approach—and the one adopted in Table 1 and throughout the empirical analysis below—trims the sample by collapsing and treating as a single "action" any suits with a common relator and at least two common litigation dates (filing date, DOJ election date, or settlement or termination date). To be sure, there is a downside to this approach: Collapsing cases in this way risks treating a large scale qui tam action brought against an entire industry spread across multiple district courts the same as a single, one-shot action against a lone small defendant in a single district court. Even so, trimming reduces the sample by only 165 cases, and more than half of these come from two relators in particular, Jack Grynberg and Sequoia Orange, each of whom filed dozens of simultaneous complaints against the oil and gas and citrus industries, respectively, in the same district courts.[163] Thus, trimming is warranted to prevent these two relators, both of whom experienced little to no success, from creating outlier effects and dominating the empirical results.

Even beyond measurement issues, interpretive caution is clearly in order. As an initial matter, simple descriptive statistics tell us little about the causal mechanisms that underlie observed patterns. A plausible explanation for the tendency of repeat relators to win less frequent but larger impositions is that they tend to bring cases that are more difficult to win and that target larger and more complex types of fraud. But other explanations are also possible. One is that selection effects arising from

163. For instance, relator Jack Grynberg, a longtime oil industry operator, filed roughly sixty separate qui tam lawsuits in 1997 against oil and gas companies in the U.S. District Court for the District of Wyoming alleging a common practice of underpayment of federal royalties. See, e.g., United States ex rel. Grynberg v. Exxon Pipeline Co., No. 97-198B (D. Wyo. filed Aug. 6, 1997); United States ex rel. Grynberg v. Unocal Corp., No. 97-191D (D. Wyo. filed Aug. 6, 1997); see also T.R. Reid, Firms Harvesting Energy from Public Land May Owe U.S., Wash. Post, May 7, 2006, at A3 (describing qui tam litigation campaign of oil and gas developer Jack Grynberg against much of the oil and gas industry); Allanna Sullivan, Why Energy Magnate Is Suing Gas Pipelines on Behalf of U.S., Wall St. J., Oct. 23, 1996, at B1 (same). Similarly, the Sequoia Orange Company filed 26 separate qui tam suits in 1989 in the United States District Court for the Eastern District of California alleging that competitor citrus companies sold oranges in excess of the amount permitted by industry committees under the Agricultural Marketing Agreement Act. See, e.g., United States ex rel. Sequoia Orange Co. v. Cent. Valley Citrus, No. 89-cv-004 (E.D. Ca. filed Jan. 3, 1989); United States ex rel. Sequoia Orange Co. v. Porterville Citrus Ass'n, No. 89-003 (E.D. Ca. filed Jan. 3, 1989); United States ex rel. Sequoia Orange Co. v. San Joaquin Citrus, No. 89-cv-002 (E.D. Ca. filed Jan. 3, 1989).

DOJ intervention decisionmaking are shaping observed outcomes.[164] While the DOJ maintains that it makes intervention decisions largely on "merit" grounds, it is also possible that the DOJ instead seeks to conserve scarce public resources by declining cases brought by certain enforcers—including, one might suppose, repeat relators—seen as fully capable of vindicating government interests without the government's help.[165] If true, this would depress the intervention rate achieved by repeat relators relative to a world in which the DOJ chooses cases on "merit" alone, thus understating the repeat-relator advantage. The public bureaucracy literature suggests that a contrary logic is also possible: A risk-averse and politicized DOJ might seek to keep political overseers at bay by intervening more liberally in cases brought by more competent enforcers even where the government's presence adds little value.[166] The DOJ might do so either to avoid embarrassment by minimizing impositions in cases it declines (since more competent enforcers might be better equipped to litigate cases to judgment in the DOJ's absence), or to maximize successful cases in which the DOJ participates, thus proving to political overseers the agency's importance to the regime.[167] In these circumstances, DOJ selection effects would raise repeat relators' intervention rates above what they would be in the absence of strategic DOJ selection. Disentangling which, if any, of these effects dominates is difficult without an independent measure of case quality.[168] Accordingly, their possible presence is merely noted here.

164. See Engstrom, Public Regulation of Private Enforcement, supra note 22, at 25, 34 (noting substantial positive effect of DOJ intervention on case outcomes and exploring determinants of DOJ decisionmaking).

165. Id. at 19; see also Robin Page West, Advising the Qui Tam Whistleblower 51 (2009) (noting DOJ is less likely to intervene where "the relator's counsel has the perceived ability to litigate the case satisfactorily on its own"); Kolis, supra note 109, at 438 ("[I]f the relator and his or her attorney appear to have the resources and capability to prosecute the suit effectively, DOJ will be less likely to intervene." (citing Telephone Interview with Steven Altman, Assistant Dir., Commercial Litig., U.S. Dep't of Justice (Sept. 10, 1992))).

166. Engstrom, Public Regulation of Private Enforcement, supra note 22, at 19.

167. Id. at 35.

168. Id.

TABLE 2: TOP 25 REPEAT RELATORS AND SELECTED LITIGATION OUTCOMES IN QUI TAM CASES, 1986–2011

Relator	*Case Tally*	*Earliest and Latest Filings*	*DOJ Intervene Rate*	*Imposition Rate*	*Mean Imposition, All Cases*
Cox, Jeff	23	1996-1998	8.7%	8.7%	$0.0†
Grynberg, Jack	20	1995-2005	10.0%	10.0%	$0.4
Piacentile, Joseph	14	1997-2007	35.7%	30.8%	$12.4
Roberts, Neal	13	2000-2004	61.5%	66.7%	$25.2
LaCorte, William	10	1993-2003	30.0%	40.0%	$18.4
Taxpayers Against Fraud	10	1988-2003	80.0%	80.0%	$49.0
Folliard, Brady	8	2007-2008	0.0%	0.0%	$0.0
Cost Containment Recovery Services	8	1994-2002	12.5%	14.3%	$0.3
Meshel, William	7	2002-2011	14.3%	0.0%	$0.0
Fraud Watch	7	1995-2002	0.0%	0.0%	$0.0
Fried, Joseph	6	2005-2007	0.0%	0.0%	$0.0
Piacentile, Christopher	6	1993-1999	50.0%	50.0%	$3.6
Friedman, Peter	6	1992 only	16.7%	0.0%	$0.0
Hubbard, Denise	6	2003-2005	33.3%	16.7%	$0.2
Olenick, Bennet	6	2004-2007	16.7%	16.7%	$0.2
Steeley, Barry	6	1994-1998	50.0%	60.0%	$1.6
Sequoia Orange Co.	6	1988-1991	0.0%	0.0%	$0.0
Ven-A-Care of FL Keys	5	1994-2004	80.0%	80.0%	$283.0
Bennett, Elaine	5	2007-2009	20.0%	20.0%	$0.8
S.E. Medical Consultants	5	1995 only	20.0%	20.0%	$0.5
Feingold, Richard	5	1994-1999	20.0%	20.0%	$0.1
Rille, Norman	5	2004 only	100.0%	100.0%	$40.7
Found. Fair Contracting	5	1995-2002	0.0%	25.0%	$0.0†
Lisitza, Bernard	5	2001-2006	80.0%	100.0%	$14.9
Wright, Harrold	5	1996-1999	40.0%	40.0%	$63.4

Notes: "Case Tally" includes all unsealed cases that had drawn a DOJ election decision as of January 1, 2012. Results for "DOJ Intervene Rate" were calculated using "Case Tally" as the denominator. Results for "Imposition Rate" and "Mean Imposition, All Cases" were calculated using only unsealed, terminated (closed) cases as of January 1, 2012. Imposition amounts are reported in millions of 2011 dollars. Entries for "Mean Imposition, All Cases" marked with a † were positive but less than $25,000. Cases sharing a common relator and filing, DOJ election, or termination date were collapsed into a single "action" to control for multiple (as opposed to omnibus) relator filings. See infra note 180 and accompanying text.

It is also possible that the ranks of repeat relators are sharply segmented, with relatively few repeat relators or distinct repeat relator types enjoying substantially greater success, thus driving the results in unobserved ways. Table 2 assesses such concerns by setting forth a detailed league table[169] of the top twenty-five repeat relators and selected litigation outcomes across the study period. The results demonstrate that intervention rates vary widely among relators who have filed four or more cases, ranging from 100% (e.g., Norman Rille) to 0% (several). Imposition rates also vary widely, from 100% (Rille, Bernard Lisitza) to 0% (several). Turning, finally, to imposition amounts, the segmentation here is extreme. To the extent that repeat relators enjoy higher mean impositions, it appears to be due in large part to the work of relatively few relators, among them two noted previously: Ven-A-Care and Harrold Wright.[170]

Table 3 continues the analysis by examining 407 cases from a randomly-drawn subsample of 500 qui tams filed since 1986 for which more detailed information about relator identities could be obtained. Disaggregating the data enriches our understanding of relator dynamics and helps evaluate long-standing claims about the effect of a relator's relationship to the defendant on qui tam litigation outcomes. Chief among these are the claim by some of qui tam's detractors that organizational "outsiders," who lack the "insider" status of classic whistleblowers and instead gain information about fraud through investigative efforts or other means, surface less reliable information about fraud or otherwise engage in abusive filing practices.[171]

As Table 3 reveals, these "outsider" cases, defined as a case in which all relators are an outsider as to all defendants, account for one quarter of qui tam actions, with pure "insider" cases, in which all relators are an insider as to at least one defendant, accounting for a relatively larger, three-quarter share. Table 3 also provides a more detailed ethnography of relator types within these broader categories. Thus, the data suggest that insider cases are brought in roughly equal measure by line- and

169. A league table is a standings or ranking chart or list that compares institutions, nations, companies, or sports teams, among others, in order of ability or achievement.

170. Note as well that a number of the most and least successful repeat relators are organizations or entities devoted to antifraud efforts. Thus, Taxpayers Against Fraud, widely viewed as the premier advocacy organization for the organized relators' bar, has achieved greater success, while a number of other entities, including Foundation for Fair Contracting, Fraud Watch, and Cost Containment and Recovery Services (with the latter possibly being a successor of Fraud Watch), have enjoyed relatively little or no success. Although, as noted previously, courts and commentators have debated the role played by organizational relators, they do not appear, at least among the most active relators, to fare substantially better or worse than individuals. Future research might seek to compare the litigation outcomes achieved by organizational and individual relators across the run of qui tam cases—a task that is beyond the scope of this Article.

171. See supra notes 121–123 and accompanying text (discussing how outside relators use secondhand information to build cases).

management-level employees, with the latter defined as any employee with managerial or other supervisory authority within the defendant entity.[172] Similarly, outsider cases appear to be filed in roughly equal measure by business competitors, business partners (or subcontractors), third-party program beneficiaries (e.g., patients or other recipients of defendants' federally-funded services), and "investigators" (who, according to case-file materials, built their fraud cases via some combination of existing knowledge of an industry and investigative effort, but do not fit into any of the other "outsider" categories).

The rest of Table 3 paints a revealing portrait of litigation fortunes across these various relator types. Taken as a whole, insiders are more successful than outsiders at winning DOJ intervention and impositions: Insiders win DOJ intervention twice as often as outsiders (33.1% versus 15.2%) and achieve an imposition 1.5 times more often (36.0% versus 21.6%). One interpretation is that this supports the view, noted previously, that outsiders surface less direct—and, as a result, less reliable—information about fraud.[173] To that extent, these results also highlight the difficult calibration challenges facing legislators who seek to harness heterogeneous private enforcers: Many would-be "whistleblowers" with actionable information about wrongdoing may be unwilling to come forward because of the private costs, psycho-emotional or otherwise, of reporting on colleagues or engaging in "organizational dissent."[174] But outsiders do not typically incur those costs. As a result, bounties calibrated to overcome the costs incurred by organizational *insiders* may therefore yield socially costly overenforcement by organizational *outsiders* who obtain information about wrongdoing but do not pay such costs and, as a result, are willing to bring more marginal claims.

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172. Cases were coded as "Management-Level" where the relator had at least some managerial or supervisory authority over others within the defendant entity. Examples include: company officers of any kind (e.g., chief financial officers, vice presidents, etc.), physicians, and all other employees (e.g., nurses) with titles denoting "manager," "director," "supervisor," "senior," "head," or "lead" status. Examples of "Line-Level" employees include: billing agents, sales representatives, mechanics, nurses, security guards, medical technicians, tool inspectors, and administrative assistants, so long as they lack titles denoting "senior," "head," or "lead" status.

173. See supra text accompanying notes 121–123.

174. Orly Lobel, Citizenship, Organizational Citizenship, and the Laws of Overlapping Obligations, 97 Calif. L. Rev. 433, 434, 486–87 (2009) (discussing myriad factors that discourage organizational dissent, including potential personal costs); see also Kesselheim et al., Whistle-Blowers' Experiences, supra note 83, at 1838 (noting insider relators have "suffered more for their involvement" than outsiders).

TABLE 3: LITIGATION SUCCESS RATES BY INSIDER AND OUTSIDER STATUS AND SUBCATEGORIES OF EACH IN RANDOM SAMPLE OF QUI TAM CASES, 1986–2011

Relator "Type"	*Case Tally*	*DOJ Intervene Rate*	*Imposition Rate*	*Mean/Median Imposition Dollars, Winning Cases*	*Mean Imposition Dollars, All Cases*
All Insiders	308	33.1%	36.0%	$15.0/$1.3	$5.4
Insiders—Line-Level	148	30.4%	33.8%	$10.2/$0.8	$3.4
Insiders—Mgmt-Level	160	35.6%	38.1%	$18.9/$2.0	$7.2
All Outsiders	99	15.2%	21.6%	$30.2/$0.7	$6.5
Outsiders—Business Competitor	19	15.8%	27.8%	$0.5/$0.1	$0.1
Outsiders—Business Partner or Subcontractor	30	23.3%	31.0%	$7.3/$2.0	$2.3
Outsiders—Third-Party Beneficiary	23	8.7%	21.7%	$0.6/$0.1	$0.1
Outsiders—"Investigators"	27	11.1%	7.4%	$282/$282	$20.9
All Relators	407	28.7%	32.5%	$17.5/$1.3	$5.7
Pearson chi^2 / ANOVA (P-value)	—	14.495 (*p=0.013*)	11.474 (*p=0.043*)	8.21 (*p=0.000*)	1.16 (*p=0.329*)

Notes: "Case Tally" includes all unsealed cases that had drawn a DOJ election decision as of January 1, 2012. Results for "DOJ Intervene Rate" were calculated using "Case Tally" as the denominator. Results for "Imposition Rate" and "Mean Imposition Dollars, All Cases" were calculated using unsealed, terminated (closed) cases as of January 1, 2012 (n=396) and, for dollar calculations, by assigning zeroes to closed cases that did not yield impositions. Mean and median impositions in the fifth column ("Mean/Median Imposition Dollars, Winning Cases") include only cases that generated an imposition—i.e., successful cases (n=128). "Insiders" must be an insider as to at least one defendant. Outsiders must be an outsider as to all defendants. Four categories of cases are omitted from the sample: (i) cases brought by government employees (six total); (ii) cases brought by a mix of insiders and outsiders or multiple insider or multiple outsider types (fourteen

total); (iii) cases for which the inside-outside relationship of the relator could not be ascertained from case materials (thirty-seven total); and (iv) cases for which case materials could not be obtained at all(thirty-six total). Imposition amounts are reported in millions of 2011 dollars. P-values were calculated across all subcategories using chi-square (intervention and imposition rates) or ANOVA (per-win mean/median and per-filing mean impositions) tests.

Drawing conclusions about the quality of outsider qui tam enforcement efforts grows more complicated, however, when attention is turned to the imposition amounts achieved by insiders and outsiders. For instance, though outsiders win impositions less often, they are also generally more "efficient" than insiders at returning funds to the federal fisc ($6.5 million versus $5.4 million on a per-case basis). But note the lumpiness of the data: The largest imposition in the subsample—a $429 million award in a federal oil and gas royalty case brought against much of the industry—falls into the "Outsider-Investigator" category, since the relator, though he had worked as an oil executive at Atlantic Richfield Company (ARCO) earlier in his career, did not sue ARCO and so was neither an insider nor a competitor of any defendant.[175] This case is plainly an outlier in statistical terms, and dropping it from the subsample reverses the valence of the insider-outsider results, with insiders winning substantially larger impositions (e.g., mean impositions of $15.0 million versus $3.7 million on a per-win basis and mean impositions of $5.4 million versus $0.8 million on a per-filing basis). Even so, dropping the case risks an unrealistic portrayal of the regime. While some outsider cases are small-scale affairs (e.g., one investigator relator in the sample recounted in pleadings that he performed case research at a local library), just as many are ambitious litigations targeting large-scale frauds, some spanning entire industries, brought by longtime industry participants and experts.

The remaining results for the more detailed break-out of insider and outsider types fill out the above story about the link between a relator's relationship to the defendant and qui tam litigation outcomes. First, business competitors are not substantially less likely than the average relator to win impositions, but achieve far smaller impositions when they do and only rarely win DOJ intervention. This lends credence to the concern articulated by some qui tam critics that business competitors bring FCA claims as part of broader business disputes, perhaps even appending them to legal actions asserting other types of claims (e.g.,

175. See Professional Resumé of J. Benjamin Johnson, Jr., http://www.summitrm.com/JBJ%20Resume.htm (on file with the *Columbia Law Review*) (last visited Sept. 1, 2012) (summarizing prior professional work experience and discussing litigation testimony in United States ex rel. Johnson v. Shell Oil Co., No. 9:96-CV-00066 (E.D. Tex. Feb. 28, 2002)).

antitrust), but with only an incidental focus on returning funds to the federal treasury.[176]

Second, the results for insider relators imply that management-level employees bring stronger or larger fraud cases compared to line-level employees. This finding is consistent with the standard idea that higher-level employees, with their more synoptic organizational view, are better-positioned to discover and assemble reliable information about wrongdoing.[177] And yet, therein lies a possible paradox at the heart of whistleblower laws more generally: These same employees are also more likely to be the most professionally, financially, and even psychologically entrenched within the organization and may therefore be less likely to come forward with information.[178] These findings once more underscore the difficult calibration challenges facing legislators who deputize private enforcers with very different motives and means.

Taken together, the empirical portrait presented above establishes an initial set of conclusions about the role of repeat play and specialization in the qui tam regime. More analysis remains to be done, particularly subsection 4's multivariate analysis. For now, however, the descriptive results offer little support for the notion that more specialized relators—whether defined as repeat or outsider relators—are an obvious drag on the overall efficiency of the qui tam regime.

2. *Descriptive Findings*: *Relator Counsel*. — Table 4 quantifies the repeat-play advantage among qui tam counsel by reporting litigation outcomes broken out across four "tiers" of relator counsel, including "Super" repeat firms, "Heavy" repeat firms, "Regular" repeat firms, and "One-Shot" firms.[179] Both intervention and imposition rates show a clear

176. See supra notes 115 and accompanying text.

177. See, e.g., Terance D. Miethe & Joyce Rothschild, Whistleblowing and the Control of Organizational Misconduct, 64 Sociological Inquiry 322, 332 (1994) (noting managers and supervisors are "in more pivotal positions to directly observe or be informed about organizational wrongdoing"); see also Marcia P. Miceli & Janet P. Near, Blowing the Whistle: The Organizational and Legal Implications for Companies and Employees 179–230 (1992) (discussing factors that influence whistleblowing, including personal characteristics and situational variables, such as organizational position of whistleblower).

178. See Bucy, Private Justice, supra note 3, at 62 (noting highly skilled insiders are "fiercely loyal to their corporation, profession, and colleagues, not to government regulators," and "incur a greater professional risk by coming forward than do employees whose skill and corporate position are more fungible"); Lobel, supra note 174, at 486–87 (discussing factors that determine willingness of employees to surface information about wrongdoing).

179. Note that, as with the repeat-relator analysis, the allocation of firms to "tiers" is entirely retrospective. Thus, a firm was placed in the "Super" tier if its total case tally across the period 1986–2011 was forty or more cases. Further down the table, a firm was placed in the "Regular" tier if its total case tally was greater than one but less than ten over the study period. Subsection 4's multivariate regression analysis offers an alternative view by using a "rolling" measure of firm experience keyed to each firm's accumulated experience (i.e., past number of cases) at the time of each case filing.

downward cascade from more to less experienced qui tam relator counsel, with "Super" counsel roughly 1.5 times more likely to win DOJ intervention (37.1% versus 22.6%) and achieve impositions (40.7% versus 29.0%). Note that this is the opposite of the repeat-relator results presented in Table 1, where intervention and imposition rates generally declined with experience.

TABLE 4: LITIGATION SUCCESS RATES AMONG QUI TAM RELATOR COUNSEL BY FIRM EXPERIENCE, 1986–2011

Firm "Tier"	*Case Tally*	*DOJ Intervene Rate*	*Imposition Rate*	*Mean/Median Imposition Dollars, Winning Cases*	*Mean Imposition Dollars, All Cases*
"Super" Repeat Counsel (40–144 cases)	698	37.1%	40.7%	$28.6/$3.6	$11.7
"Heavy" Repeat Counsel (10–39 cases)	915	33.1%	39.2%	$23.1/$2.2	$9.1
"Regular" Repeat Counsel (2–9 cases)	1,437	24.9%	31.3%	$14.1/$1.1	$4.4
"One-Shot" Counsel (1 case)	1,276	22.6%	29.0%	$7.3/$0.7	$2.1
All Counsel	4,326	27.9%	33.8%	$17.5/$1.4	$5.9
Pearson chi^2 / ANOVA (P-value)	—	66.1311 (*p=0.000*)	39.1277 (*p=0.000*)	6.39 (*p=0.000*)	10.76 (*p=0.000*)

Notes: "Case Tally" includes all unsealed cases that had drawn a DOJ election decision as of January 1, 2012. Results for "DOJ Intervene Rate" were calculated using "Case Tally" as the denominator. Results for "Imposition Rate" and "Mean Imposition Dollars, All Cases" were calculated using unsealed, terminated (closed) cases as of January 1, 2012 (n=3,817) and, for dollar calculations, by assigning zeroes to closed cases that did not yield impositions. Mean and median impositions in the fifth column ("Mean/Median Imposition Dollars, Winning Cases") include only cases that generated an imposition—i.e., successful cases (n=1,291). Imposition amounts are reported in millions of 2011 dollars. P-values were calculated using chi-square (intervention and imposition rates) or ANOVA (per-win mean/median and per-filing mean impositions) tests.

Even more striking are the substantial differences in imposition sizes: "Super" counsel have achieved impositions that are roughly four to five times that of one-shotter counsel, whether calculated on a per-win basis ($28.6 million versus $7.3 million) or a per-filing basis ($11.7 million versus $2.1 million). Perhaps even more so than repeat relators, counsel specialization and experience seem to matter, and matter substantially, within the qui tam regime.

Once again, some measurement issues deserve mention. The first was addressed previously in the repeat-relator analysis: how to handle relator-side firms that file clusters of qui tam suits naming one among several defendants in each suit rather than proceeding by way of a single, omnibus complaint joining all defendants. This analysis uses the same "trimming" approach used before, collapsing into a single action all cases that share common counsel and common filing, DOJ election, or termination dates.[180]

Two additional measurement issues are specific to the repeat-counsel context and stem from the fact that many qui tam cases involve multiple relator-side firms. The first is how to treat cases that feature multiple relator-side counsels with differing levels of qui tam experience. There are two options. One could use an "all" approach in which every firm providing relator-side representation receives separate credit for case outcomes. But this approach may be problematic: It is a common litigation practice for larger or more sophisticated firms to retain "local counsel" to perform ministerial filing tasks or because no firm lawyer holds the necessary bar membership to practice before the court. Including local counsel in repeat-play tallies will dilute, and thus understate, the repeat-play advantage, as such firms are unlikely to add much litigation value. One might instead prefer a "max" approach that limits the analysis to the most experienced firm providing representation in each case. This creates the opposite risk, however, by denying less experienced firms credit for outcomes where they in fact play a substantial role, potentially overstating the repeat-play advantage. While neither approach is perfect, note that the "max" and "all" approaches can be thought to provide upper and lower bounds on the specialization advantage among qui tam relator counsel. In general, the analysis below reports findings using the "max" approach and then notes how the results change, if at all, using the "all" approach.[181]

The second measurement issue is that it is difficult to ascertain from the aggregate data which relator-side firms were present at the beginning of a case and which became involved in the case midstream. While this

180. See supra note 163 and accompanying text.

181. Using the "all" approach yields 7,100 data points by virtue of double-counting cases with multiple counsel but reveals the same basic relationships between counsel tiers presented in Table 4: higher intervention and imposition rates and larger mean and median impositions moving from less to more experienced counsel.

might seem to be cause for concern, a review of fifty randomly drawn cases suggests that it is not. In thirty-four of those cases, there were no counsel comings and goings at all. The remaining sixteen cases involved at least some entry or exit of counsel, but none presented measurement concerns. First, in fourteen of the sixteen cases, the entering or exiting firms had roughly comparable experience to the other firms. More importantly, among the ten cases out of these same sixteen for which the precise timing of entry or exit could be ascertained from docket and other case materials, eight involved a new firm's entry *after* DOJ declination and so were what relator counsel sometimes refer to as "salvage" cases. Here, it makes sense to allocate "credit" to the late-arriving firm for its success or failure in turning the case around by persuading the DOJ to belatedly intervene or otherwise drive the case to a successful resolution. The remaining two cases came prior to a DOJ case-election decision, where it is likewise appropriate to allocate "credit" for the case to the late arriver.

To be sure, interpretive caution is once more in order even beyond these measurement issues. As with the repeat-relator analysis, the above findings abstract from causal mechanisms and cannot tell us whether superior case selection, litigation skill, advantageous relationships with the DOJ, or some other factor, including DOJ selection effects, best explain the repeat-play advantage. Nor do aggregated statistics account for the possibility that segmentation within the ranks of relator-side firms is driving the results in unobserved ways, with some firms initiating only highly meritorious qui tam actions and others engaging in higher-volume and more speculative enforcement efforts.

One way to shed light on this latter issue is, as with the repeat-relator analysis, to examine detailed league tables in search of regularities. Table 5 lists the twenty-five most active qui tam relator firms between 1986 and 2011, along with case tallies and selected litigation outcomes. A few results stand out. First, there exists a fair degree of concentration at the top end of the organized relators' bar, with the top ten firms accounting for substantially more filings (625) than the next fifteen firms (484). Second, success rates among the top twenty-five relator firms are highly variable, whether looking at intervention and imposition rates or per-filing imposition amounts. Among firms with twenty-five or more filings, the clear industry leaders in consistently achieving DOJ intervention and impositions are Vogel, Slade & Goldstein (63.0% intervention rate; 65.9% imposition rate) and Phillips & Cohen (52.8% intervention rate; 59.2% imposition rate), with Wilbanks Bridges close behind (52.0% intervention rate; 61.9% imposition rate). Bottom honors among Table 5 firms go to Grayson Kubli (2.3% intervention rate; 5.1% imposition rate).

TABLE 5: TOP TWENTY-FIVE REPEAT RELATOR FIRMS AND SELECTED LITIGATION OUTCOMES IN QUI TAM CASES, 1986–2011

Relator Counsel	*Case Tally*	*Earliest and Latest Filings*	*DOJ Intervene Rate*	*Imposition Rate*	*Mean Imposition, All Cases*
Phillips Cohen	144	1987-2010	52.8%	59.2%	$34.2
Warren Benson	125	1987-2011	29.6%	32.7%	$2.8
Helmer Martins Rice Popham	58	1988-2007	37.9%	58.2%	$16.0
Kreindler Kreindler	52	1988-2009	30.8%	22.2%	$4.8
Kenney McCafferty	52	1995-2010	46.2%	39.6%	$12.6
Mark Allen Kleiman	52	1996-2010	25.0%	30.4%	$6.8
Bothwell Bracker	50	1994-2011	26.0%	27.9%	$1.3
Nolan Auerbach	49	1996-2009	44.9%	43.5%	$12.4
Simms Showers	47	1993-2009	42.6%	43.9%	$3.3
Vogel Slade Goldstein	46	1988-2009	63.0%	65.9%	$6.8
James Hoyer Newcomer Smiljanich	46	1995-2010	23.9%	27.8%	$8.2
Grayson Kubli	44	1994-2010	2.3%	5.1%	$0.5
Cohan West Karpook	39	1993-2010	43.6%	40.0%	$4.8
Ashcraft Gerel/ McKnight Kennedy	38	1998-2010	7.9%	10.3%	$5.8
Herbert Hafif Law Office	34	1987-2008	17.6%	26.7%	$2.7
Frank Haron Weiner	34	1993-2009	35.3%	37.5%	$6.0
Packard Packard Johnson	33	1989-2004	39.4%	45.2%	$33.4
Morgan Verkamp	31	1995-2009	35.5%	45.0%	$1.9
Kohn Kohn Colapinto	31	1995-2011	6.5%	11.5%	$3.2
Ronald Osman Assocs.	28	1993-2006	50.0%	62.5%	$19.1
Simpson Law Firm	28	1994-2010	21.4%	33.3%	$1.2
Hare Wynn Newell	27	1995-2010	48.1%	52.0%	$23.4
Wilbanks Bridges	25	1997-2009	52.0%	61.9%	$19.8
Candace McCall	23	1993-2005	30.4%	45.0%	$3.0
Begelman Orlow Melletz	23	1997-2009	4.3%	10.5%	$0.4

Notes: "Case Tally" includes all unsealed cases that had drawn a DOJ election decision as of January 1, 2012. Results for "DOJ Intervene Rate" were calculated using "Case Tally" as the denominator. Results for "Imposition Rate" and "Mean Imposition, All Cases" were calculated using only unsealed, terminated (closed) cases as of January 1, 2012. Imposition amounts are reported in millions of 2011 dollars. Cases sharing common

relator counsel and filing, election, or termination dates were collapsed into single "actions" to control for multiple (as opposed to omnibus) filings.[182]

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182. See supra note 160 and accompanying text (explaining treatment of data). Note that Table 5's tallies use a maximally inclusive "all" approach to allocating cases to firms. See supra note 181 and accompanying text (comparing "max" and "all" approaches). Specifically, a firm was given "credit" for a case if one of two conditions obtained: (i) the firm was listed on the case docket sheet or the DOJ's internal tracking system as relator's counsel; or (ii) an attorney presently working for the firm was listed as relator's counsel on the case docket sheet or the DOJ's internal tracking system, even if the attorney was working at a different firm at the time. Thus, a limited number of cases were attributed to one firm and at the same time "traveled" with an attorney to another firm. As an example, a handful of cases that Janet Goldstein, now of Vogel, Slade, & Goldstein, litigated with John Phillips, now of Phillips & Cohen, were allocated to both firms. As a second example, cases that G. Mark Simpson, now of Simpson Law Firm, litigated with Michael Bothwell, now of Bothwell Bracker, were also allocated to both firms. The one exception to this rule is cases litigated by H. Vincent McKnight, Jr., now of McKnight & Kennedy, while he was with Ashcraft & Gerel. Because nearly all of Ashcraft & Gerel cases were litigated by Mr. McKnight, the two firms were simply merged in Table 5. In addition, the author solicited feedback from multiple firms listed in Table 5 and provided the underlying list of cases attributed to those firms in order to cross-check data accuracy. The resulting case "audits" highlighted some issues that warrant mention. First, the firm Nolan & Auerbach expressed concern that it served as "local" rather than "lead" counsel in three of the forty-nine cases allocated to it in the data set. While an ideal measurement approach might distinguish between cases based on the intensity of a firm's participation, the evident complexities of making such determinations precluded such an approach here. Nolan & Auerbach also pointed to a successful case that was not captured among the forty-nine cases allocated to it. However, the firm does not appear on the case docket sheet or the DOJ-maintained data as providing counsel in the case. This raises the possibility that firms listed in Table 5 actively litigated cases via co-counsel but did not make an appearance before the court and were also omitted from the DOJ's tracking system. To that extent, Table 5 may over- or under-estimate a firm's litigation success rates. Second, an audit of the thirty-one cases allocated to Kohn Kohn & Colapinto in the data set turned up four case discrepancies. Three of the cases had been allocated to the firm in the data set, but were not listed in DOJ's internal tracking system as having produced an intervention and/or imposition. In each instance, the firm provided case materials verifying the claimed outcomes. A possible explanation for omission of one of these three cases was that the DOJ had strongly opposed the settlement, leading the district court to take the unusual step of routing payment of the judgment through the relator. The fourth case was missing entirely from the DOJ's internal tracking system, perhaps because the case generated an imposition via a bankruptcy proceeding. While one can only speculate about whether such factors explain the discrepancies or their incidence across the run of qui tam cases, it is important to note that the statistical effect for the Kohn Kohn & Colapinto firm, at least, is significant: Including the cases would double its intervention rate (from 6.5% to 13%) and substantially boost its imposition rate (from 11.5% to 26.9%). Of course, an analyst might have avoided such errors by supplementing Table 5's findings with cases identified via comprehensive firm-by-firm audits, and at least one firm urged such an approach. However, an approach that relied on voluntary firm revelation of cases would also risk introducing other sources of error: To wit, among the dozen cases identified by firms as missing from the data set during firm audits encompassing more than 200 cases total, precisely *none* was a losing case, raising obvious selection concerns. Still, given the above measurement issues—not to mention the broader complexities of choosing counsel—prospective relators should hesitate before basing representation decisions on Table 5's results alone.

Still, few of the firms listed in Table 5 would seem to merit the "filing mill" label. First, some of the reasons for the observed results seem to be firm-specific. Grayson Kubli, for instance, specialized in defense procurement cases involving the Iraq war, where doctrinal barriers and, in the view of some, foot-dragging by the DOJ under President George W. Bush, have stymied qui tam enforcement efforts.[183] In particular, Grayson Kubli lawyers won a jury verdict in a high-profile trial against a defense contractor that was set aside by the district court and then reinstated on appeal nearly three years later on statutory interpretation grounds—specifically, that the Iraq Coalition Provisional Authority was not an instrumentality of the United States government within the FCA's meaning.[184]

Second, Table 5 reveals relatively few outliers and, by extension, little clean or obvious segmentation. To be fair, firms plainly deal in volume to greater or lesser degrees. Phillips & Cohen and Warren Benson, the two most active relator-side firms, offer a pointed contrast in this regard, with Phillips & Cohen roughly twice as likely as Warren Benson to achieve DOJ intervention and subsequent impositions, despite roughly comparable numbers of filings since 1987. And yet, there is little evidence that one segment of the relators' bar has clustered around a strategy of initiating only highly meritorious qui tam actions while another, separate segment has engaged in higher-volume and more speculative enforcement efforts.

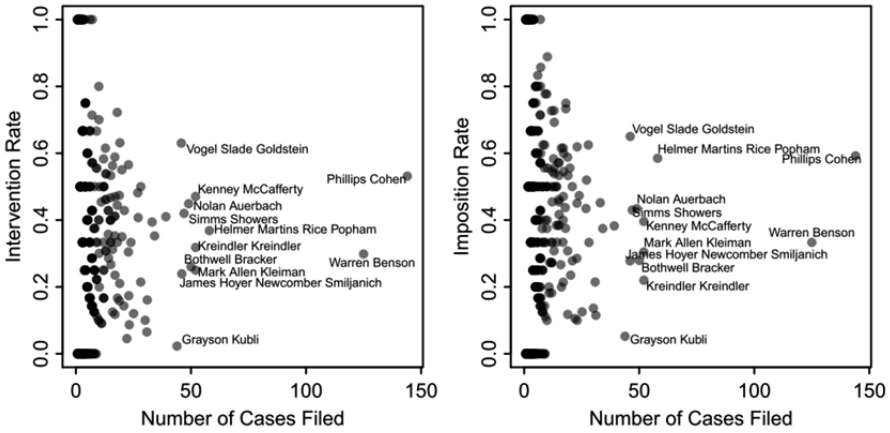
Nor does there appear to be any systematic relationship between firm filing volume and intervention or imposition rates. Figure 2 offers graphical confirmation of this point by plotting firm case tallies against intervention rates (the left panel) and imposition rates (the right panel) for the roughly 3,500 firms in the data set, with the twelve most active relator-side firms denoted with text. Plainly absent is a trademark slope from the upper-left to the lower-right that would imply a negative corre-

183. See Engstrom, Public Regulation of Private Enforcement, supra note 22, at 43–45 (noting suspicious bump-up in DOJ time-under-investigation for defense procurement cases that drew DOJ election decisions in the first two years of the Obama Administration, suggesting DOJ of previous Bush Administration may have delayed action on those cases).

184. See United States ex rel. DRC, Inc. v. Custer Battles, LLC, 562 F.3d 295, 308 (4th Cir. 2009), rev'g 444 F. Supp. 2d 678 (E.D. Va. 2006). For case commentary, see Jessica C. Morris, Note, Civil Fraud Liability and Iraq Reconstruction: A Return to the False Claims Act's War-Profiteering Roots?, 41 Ga. L. Rev. 623, 635–46 (2007) (discussing district court's analysis of FCA in *Custer Battles*); Erik Eckholm, On Technical Grounds, Judge Sets Aside Verdict of Billing Fraud in Iraq Rebuilding, N.Y. Times, Aug. 19, 2006, at A6 (reporting on district judge's decision to throw out jury verdict); Ellen Nakashima, Court Revives Suit Over Iraq Work, Wash. Post, Apr. 11, 2009, at A9 (reporting on Fourth Circuit's reversal of district court).

lation between firm case volume and success rates, whether among top firms or across the full spectrum of relator counsel.[185]

FIGURE 2: SCATTERPLOTS OF CASE FILINGS VERSUS DOJ INTERVENTION AND IMPOSITION RATES AMONG QUI TAM RELATOR FIRMS, 1986–2011



Finally, the scatter plots reveal possible differences in top firms' relationships with the DOJ. Phillips & Cohen enjoys a high DOJ intervention rate and a comparably high imposition rate, and it rarely pursues a case to settlement or judgment in the absence of DOJ intervention.[186] Helmer, Martins, Rice & Popham, by contrast, is roughly half as likely to win DOJ intervention in each sample case, and yet is *more* likely to go on to win impositions.[187] Interviews with qui tam practitioners suggested that the Helmer firm in particular has a reputation for taking a more combative position with the DOJ than some firms.[188] Indeed, the firm boasts on its website that "[i]n some of our cases the United States

185. A Lowess curve fitted to the top thirty firms (omitted from Figure 2) confirms the lack of any relationship between filing volume and intervention or imposition rates, as does simple Pearson-R correlation analysis: After constraining the sample to firms with fifteen or more filings, Pearson-R scores were only 0.14 for firm filing volume and intervention rate and 0.12 for firm filing volume and imposition rate. Constraining the sample to firms with twenty or more filings yielded Pearson-R scores of 0.3 for filings and each measure of success.

186. The data suggest that Phillips & Cohen has achieved impositions in twelve unintervened cases.

187. The data suggest that Helmer, Martins, Rice & Popham, though it has filed fewer than half as many cases as Phillips & Cohen, has achieved an imposition in thirteen unintervened cases.

188. Interview with Relator Counsel, supra note 136; Interview with Former Assistant Dir., supra note 132.

Government has not intervened, but we have nonetheless pursued the defendants on behalf of our clients and the United States."[189]

As with the relator measures, the basic descriptive story here runs contrary to some of the standard critiques of the organized relators' bar. Simply put, the evidence suggests that counsel specialization and experience matter and have generally led to better litigation outcomes.

3. *Descriptive Findings*: *Former DOJ "Insiders."* — A third and final set of descriptive results probes the repeat-play advantage of a very particular type of qui tam enforcer: relator-side counsel who have previously represented the government in qui tam actions. As noted previously, a number of commentators have raised the specter of a "revolving door" between qui tam prosecutorial ranks and the organized relators' bar.[190]

TABLE 6: LITIGATION SUCCESS RATES AMONG RELATOR COUNSEL BY FORMER DOJ "INSIDER" STATUS IN QUI TAM CASES, 1986–2011

Counsel "Type"	*Case Tally*	*DOJ Intervene Rate*	*Imposition Rate*	*Mean/Median Imposition Dollars, Winning Cases*	*Mean Imposition Dollars, All Cases*
Former DOJ "Insiders"	146	52.7%	56.8%	$10.0/$2.2	$5.6
DOJ "Outsiders"	4,180	27.1%	33.0%	$17.9/$1.4	$5.9
All Counsel	4,326	27.9%	33.8%	$17.5/$1.4	$5.9
t-test (P-value)	—	-6.8344 (*p=0.000*)	-5.7063 (*p=0.000*)	1.0325 (*p=0.3020*)	0.0657 (*p=0.9477*)

Notes: "Case Tally" includes all unsealed cases that had drawn a DOJ election decision as of January 1, 2012. Results for "DOJ Intervention Rate" were calculated using "Case Tally" as denominator. Results for "Imposition Rate" and "Mean Imposition Dollars, All Cases" were calculated using unsealed, terminated (closed) cases as of January 1, 2012 (n=3,817) and, for dollar calculations, by assigning zeroes to closed cases that did not yield

189. About Our Practice, Helmer, Martins, Rice & Popham Co., L.P.A., http://www.fcalawfirm.com/fcalawsite/practice/index.html (on file with the *Columbia Law Review*) (last visited Aug. 22, 2012). The site also offers guidance on how to select qui tam counsel that suggests that would-be relators ask the following questions: "5. Of the False Claims Act cases you have filed in which the Department of Justice did not elect to proceed, what results have you obtained? 6. Will you still handle my case if the Department of Justice decides not to prosecute it?" Frequently Asked Questions, Helmer, Martins, Rice & Popham Co., L.P.A., http://www.fcalawfirm.com/fcalawsite/faq/index.html (on file with the *Columbia Law Review*) (last visited Aug. 22, 2012).

190. See supra notes 147–149 and accompanying text.

impositions. Mean and median impositions in the fifth column ("Mean/Median Imposition Dollars, Winning Cases") include only cases that generated an imposition—i.e., successful cases (n=1,291). Imposition amounts are reported in millions of 2011 dollars. P-values were calculated using t-tests.

Table 6 isolates the effect of former DOJ "insider" status by comparing litigation success rates across litigation outcomes as achieved by relator-side counsel who did and did not previously represent the government in a qui tam case, whether at the DOJ or at a U.S. Attorney's Office. The results plainly show that former DOJ insiders who provide relator-side representation in qui tam cases easily surpass their "outsider" counterparts in achieving DOJ intervention and impositions, enjoying a roughly 25% higher success rate as to each. Note, however, that former DOJ insiders nonetheless appear to win *lower* mean impositions, whether on a per-win ($10.0 million versus $17.9 million) or per-filing ($5.6 million versus $5.9 million) basis, though neither difference is statistically significant.

As with the other descriptive measures presented previously, these findings are subject to possible objections. First, and as before, it might be the case that a single DOJ insider or cluster of insiders, perhaps concentrated at only a few firms, is driving the results. The most obvious candidate is Washington, D.C.-based Vogel, Slade & Goldstein, whose founding partner litigated early post-1986 qui tam cases at the DOJ before entering the private sector.[191] The firm accounts for 46 of the 146 cases involving a former DOJ insider and also, per Table 5, enjoys one of the highest intervention and imposition rates among top relator firms. But eliminating Vogel, Slade & Goldstein from the analysis does not materially alter the results.[192] Second, former DOJ insiders might also be more experienced relative to the pool of DOJ outsiders. To that extent, mean comparisons that isolate former DOJ insiders risk confounding insider advantage with firm experience litigating qui tam cases. This is one of the merits of Section B.4's multivariate approach, which can assess the former-DOJ-insider advantage while holding other factors, including firm experience, constant.

The broader challenge is interpretive. One possibility is that higher intervention and imposition rates combined with lower imposition amounts suggest collusion between DOJ lawyers and former colleagues. To the extent that the DOJ's goal is (or should be) to maximize returns

191. Robert L. Vogel, Vogel, Slade & Goldstein, http://vsg-law.com/qui-tam-attorney/robert-l-vogel/ (on file with the *Columbia Law Review*) (last visited Aug. 22, 2012).

192. After dropping cases involving the Vogel firm from the sample, the results for each of the outcomes for "DOJ insider"- and "DOJ outsider"-represented cases did not materially change: 49.1% versus 27.0% for interventions; 54.2% versus 33.0% for impositions; $9.9 million versus $18.0 million for mean per-win impositions; and $5.4 million versus $5.9 million for mean per-filing impositions, with the same pattern of statistical significance as Table 6.

to the federal fisc, the results suggest that the DOJ may be putting scarce public enforcement resources toward cases that promise lower returns than other cases. Yet, it is important to note at this point that former DOJ insiders do not appear to be substantially less "efficient" at achieving impositions, as the difference in per-filing imposition dollars is small and statistically insignificant at conventional levels.

Alternative explanations are possible as well. Higher success rates may be attributable to insider knowledge of operational details or better and more regularized communication channels between public prosecutors and relator counsel, ensuring fewer case filings when resources at the DOJ or a particular U.S. Attorney's Office are strained or when public enforcement priorities are shifting away from certain case types and toward others. To that extent, the advantage enjoyed by former DOJ insiders in achieving DOJ intervention and impositions, though real, might be unobjectionable or even desirable.

4. *Putting It All Together*: *Multivariate Analysis*. — Multivariate regression offers a final opportunity to quantify the specialization advantage within the post-1986 qui tam regime. Considering how the parts fit together, rather than focusing on enforcer types in isolation, is important because of possible overlap along key variables of interest. For example, former DOJ insiders might be more (or less) likely to join experienced firms, and more experienced counsel might be more (or less) likely to represent repeat relators. This could bias estimates when enforcer types are assessed alone. Conditioning on covariates—that is, other possible drivers of case outcomes, including case types and time trends—permits a more precise statistical estimate of returns to specialization across enforcer types.

Table 7 presents descriptive statistics on the variables used in the models. Two of the main independent variables of interest, Repeat Relator and Former DOJ Insider, are indicator variables set to one if the relator has filed at least one prior case, or at least one relator-side counsel previously represented the government in a qui tam case while at the DOJ. Counsel Prior Cases, by contrast, is a continuous measure of firm experience set equal to the total past-case tally of each relator-side firm at the time each case was filed. In contrast to the retrospective and categorical measures of repeat play deployed previously, this variable captures enforcement expertise as it is acquired, case by case.

TABLE 7: DESCRIPTIVE STATISTICS

Variable	*Mean*	*Std. Dev.*	*Min*	*Max*
Govt Intervened	0.279242	0.448678	0	1
Won Imposition	0.338224	0.473167	0	1
Imposition Dollars	17500000	64400000	339	1130000000
Repeat Relator	0.162486	0.368938	0	1
Counsel Prior Cases	9.145455	19.62701	0	142
Former DOJ Insider	0.033832	0.180817	0	1
DOJ Resource Constraint	0.720901	0.170217	0	1.070045
Case Filed Democrat	0.505776	0.500024	0	1
Case Elected Democrat	0.518946	0.499699	0	1
Case Closed Democrat	0.547828	0.497765	0	1
Health	0.556377	0.496869	0	1
Defense	0.187847	0.390635	0	1
Case Filed Year	2000.975	5.231706	1987	2011
Case Elected Year	2002.723	5.381264	1987	2011
Case Closed Year	2003.474	5.006066	1989	2011

Notes: Reported statistics include all unsealed cases that had drawn a DOJ election decision as of January 1, 2012. Descriptive statistics do not materially differ when the sample is limited to all unsealed, terminated (closed) cases, as used in certain regression models below.

The regression models also include independent variables that existing theory and evidence suggest are necessary controls. The first, DOJ Resource Constraint, captures the effect of resource constraints on DOJ decisionmaking and is set equal to the mean number of active, intervened qui tam cases divided by the number of attorneys at the DOJ's Civil Fraud Section at the time of DOJ election during each sample year, multiplied by 100.[193] A second set of variables controls for possible partisan dynamics at the DOJ or the primary agency that was allegedly defrauded. Thus, Case Elected Democrat and Case Closed Democrat are indicator variables set to one in cases that reached an intervention decision or were terminated during the Clinton or Obama administrations, the two

193. Note that while the case-level data permits precise tracking of the total number of open and intervened cases at any point in time, the extent to which DOJ lawyers are actively litigating these cases is not observable. In complex litigation, cases often lay fallow for long stretches of time, flaring up around bouts of discovery and motions practice, with only the latter reflected on docket sheets. Regardless, the construction of the DOJ Resource Constraint variable assumes that DOJ officials understand and take account of litigation's cadence when deciding whether to intervene in the marginal case. All else equal, a DOJ that is litigating more intervened cases should be more resource-constrained than one litigating fewer.

periods of Democratic control during the study period.[194] A similarly constructed variable, Case Filed Democrat, seeks to control for once-removed partisan effects: If would-be relators perceive a political slant to DOJ decisionmaking, then they may be more likely to file suit when the DOJ is controlled by a sympathetic administration (and vice versa), resulting in more (fewer) and weaker (stronger) complaints.[195] Third, a pair of dummy variables identifies cases alleging fraud on either of two executive departments, the Departments of Health and Human Services (Health) and Defense (Defense). These are the agencies most frequently implicated in qui tam suits, with the latter also identified in interviews with relator counsel as most subject to political control or organizational opposition to qui tam.[196] A final set of variables are time controls, including Case Filed Year, Case Elected Year, and Case Closed Year, that account for possible linear time trends keyed to filings, DOJ election decisions, or case terminations.[197]

Table 8 presents the results using a mix of logistic and ordinary least squares (OLS) regression. Columns A and B deploy logistic regression because the dependent variable in each model is a binary indicator of whether each sample case achieved DOJ intervention or an imposition, respectively. Results are reported as odds ratios, meaning a value less than one implies a negative relationship between the independent and dependent variables, while a value greater than one implies a positive relationship. Columns C and D deploy OLS regression because the dependent variable is imposition dollar amounts.[198] For readers who are

194. The analysis ignores the handful of cases in which the DOJ intervened during the Reagan Administration.

195. See John M. de Figueiredo, Strategic Plaintiffs and Ideological Judges in Telecommunications Litigation, 21 J.L. Econ. & Org. 501, 502–03 (2005) (modeling strategic litigant selection effects).

196. Interview with Relator Counsel, supra note 136; Interview with Former Attorney, supra note 132.

197. Dummies are not separately included, which would be collinear with the time trend variables. Substituting year dummies for the linear time variables did not alter the coefficients on any of the main variables of interest regarding enforcer experience.

198. Note that the regression analysis presented in Table 8 does not employ Tobit methods. Tobit models are appropriate where data is "censored" above or below an upper or lower bound. A standard example is data reporting the degree of contamination of water by a chemical where available measurement devices are insufficiently sensitive to detect chemical amounts below a certain threshold. The result is that the data is artificially cut off, leaving a latent (and unobserved) variable that extends below the censor point. A Tobit model accounts for this fact, returning coefficients that capture a combination of (1) the change in the dependent variable of those data points above the limit, weighted by the probability of being above the limit; and (2) the change in the probability of being above the limit, weighted by the expected value of the dependent variable if above that limit. John F. McDonald & Robert A. Moffitt, The Uses of Tobit Analysis, 62 Rev. Econ. & Stat. 318, 318–19 (1980). However, the data used herein is not censored in the usual Tobit sense. A zero qui tam imposition is simply a losing case, and there is little or no chance of a negative recovery save the extremely rare possibility of a reverse fee shift or perhaps an

unfamiliar with odds ratios or prefer not to parse regression tables, Table 9 presents marginal effects—that is, a precise estimate of the relationship of repeat play for each enforcer type to litigation outcomes holding all other factors constant—as derived from Table 8's regression results.[199]

The results for Counsel Prior Cases mostly confirm the descriptive results presented previously. Table 9 reports that, all else equal, repeat counsel are 0.8% more likely to win DOJ intervention and impositions for every ten cases they have previously filed, a small but nontrivial amount across the run of cases. And more experienced firms bring larger cases, achieving an average of $1.8 million and $0.6 million more for every ten cases in the firm's past case portfolio on a per-win and per-filing basis, respectively, though the latter of the two misses statistical significance, though narrowly, even at the less conventional 90% level.

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employment-based counterclaim by an employer-defendant. Used here, Tobit regression would take account of both the likelihood and size of an imposition—effectively applying weights to zero-dollar impositions—and yielding a coefficient that measures something very different from the effect of repeat play on average impositions, the principal empirical question addressed. And while it is true that an analysis of effects on averages misses some things—such as a shift in quantiles away from the median (i.e., the potentially variable effect of repeat play at high, medium, or low imposition amounts)—applied economists have long noted that using a Tobit model does not make sense where data is truly uncensored, given that distribution effects can be assessed directly, if relevant, using methods such as quantile regression. See Joshua D. Angrist & Jörn-Steffen Pischke, Mostly Harmless Econometrics: An Empiricist's Companion 101–02 (2009) (summarizing debate).

199. Note that Models (B)–(D) in Table 8 do not include DOJ intervention as an independent variable. This is potentially important. DOJ intervention decisions and measures of repeat play are likely endogenous—that is, are related to one another in unobserved ways—yielding correlation between the main variables of interest and error terms. This creates a classic problem of causal inference that can typically be solved only by using an instrumental variable that can filter out the separate effect of DOJ intervention on case outcomes by providing an independent (exogenous) prediction of DOJ intervention. See Angrist & Pischke, supra note 198, at 131–33 (discussing use of instrumental variable models). Because, as is often the case, efforts to identify a sufficiently strong instrument to deploy a two-stage least squares model have not been successful, DOJ intervention has been dropped from the regression models entirely. Thus, the model results can and should be interpreted as offering a statistical prediction of the overall relationship of repeat-play and qui tam litigation outcomes, but they necessarily abstract from the underlying causal mechanism that explains the observed relationship. Put another way, the models cannot determine the extent to which counsel specialization (whether greater screening capacity, litigation skill, or the like) or the separate effects of DOJ intervention (as motivated at least in part by the identity of counsel but also by other factors) generate better case outcomes.

TABLE 8: REGRESSION MODELS PREDICTING LITIGATION SUCCESS AND IMPOSITION AMOUNTS BY ENFORCER "TYPE" IN QUI TAM CASES, 1986–2011

	Logit		OLS	
	(A)	(B)	(C)	(D)
	Probability Intervened	*Probability Imposition*	*Imposition $, Winning Cases*	*Imposition $, All Cases*
Repeat Relator	0.665***	0.565***	23.94**	5.401*
	(0.0716)	(0.0603)	(9.369)	(2.857)
Counsel Prior Cases	1.005***	1.004**	0.184*	0.0628
	(0.00193)	(0.00202)	(0.107)	(0.0434)
Former DOJ Insider	2.864***	2.581***	-10.58**	-3.417*
	(0.539)	(0.507)	(4.128)	(2.038)
DOJ Resource	0.711	0.542**	0.716	-1.283
	(0.202)	(0.163)	(15.92)	(5.197)
Case Filed Democrat	1.087	0.983	-3.086	-0.346
	(0.128)	(0.121)	(6.386)	(2.337)
Case Elected Democrat	0.990	1.225*	1.905	0.795
	(0.100)	(0.149)	(5.739)	(2.375)
Case Closed Democrat	—	0.868	4.699	1.146
	—	(0.0920)	(4.545)	(1.635)
Health	1.536***	1.375***	0.970	1.096
	(0.150)	(0.130)	(4.811)	(1.471)
Defense	1.261*	1.145	-8.698*	-2.395
	(0.152)	(0.134)	(4.788)	(1.494)
Case Filed Year	0.497***	0.542***	-10.36***	-6.040***
	(0.0147)	(0.0161)	(2.683)	(1.306)
Case Elected Year	1.852***	1.571***	7.003**	4.668***
	(0.0525)	(0.0519)	(2.938)	(1.486)
Case Closed Year	—	1.081***	2.752*	1.138*
	—	(0.0253)	(1.595)	(0.681)
Observations	4,326	3,817	1,291	3,817
Pseudo / Adj. R^2	0.169	0.136	0.090	0.060
Chi_2 / F Stat prob.	0.000	0.000	0.001	0.000

*** p<0.01, ** p<0.05, * p<0.1. Model (A) includes all unsealed cases that had drawn a DOJ election decision as of January 1, 2012. Models (B) and (D) include only unsealed, terminated (closed) cases as of January 1, 2012. Model (C) includes only unsealed, successful cases as of January 1, 2012. Logit results presented in Models (A) and (B) are reported as odds ratios, with standard errors (S.E.) in parentheses. For the OLS models

presented in Models (C) and (D), standard errors are clustered on relator identity to control for possible outlier effects.[200]

TABLE 9: MARGINAL EFFECTS OF PAST EXPERIENCE ON LITIGATION OUTCOMES BY ENFORCER "TYPE" IN QUI TAM CASES, 1986–2011

Enforcer "Type"	Δ *Probability DOJ Intervention*	Δ *Probability Imposition*	Δ *Mean Imposition Dollars, Winning Cases*	Δ *Mean Imposition Dollars, All Cases*
Repeat Relators (any prior case)	-6.6%	-10.6%	+$23.9	+5.4†
Repeat Counsel (per past 10 filings)	+0.8%	+0.8%	+$1.8†	not different from zero
Former DOJ Insiders (any prior case)	+16.9%	+17.6%	-$10.6	-$3.4†

Notes: Marginal effects are calculated from the regression results reported in Table 8. Imposition amounts are reported in millions of 2011 dollars. Marginal effects marked with a † are significant at only the 90% confidence level; all others are significant at the 95% level or better.

What about the most experienced segment of the organized relators' bar more specifically? One way to answer this question is to rerun the regression models replacing Counsel Prior Cases, the continuous measure of firm experience, with a dummy variable set to one in any case brought by a firm with twenty-five or more filings—i.e., the top twenty-three relator firms from Table 5. Doing so strengthens the results substantially: Top relator firms (again, those with twenty-five or more filings) are roughly 4% more likely to win DOJ intervention and 3% more likely to win impositions, and also achieve impositions that are roughly $12 million and $4 million larger on a per-win and per-filing basis, respectively, with all results statistically significant.[201] Thus, returns to specialization among the most experienced segment of the relator-side bar are large compared to the more modest returns to specialization observed across all levels of counsel experience in Tables 8 and 9. This further undermines any claim that more experienced firms are serving as "filing mills."

200. While clustering standard errors on relator identity reduces the statistical significance of the results, clustering instead on counsel identity has no material effect on the results.

201. These results hold when the twenty-five-case criterion is used as a rolling measure (i.e., cases are coded as brought by a top firm only upon the firm's twenty-fifth or higher filing), though the results weaken somewhat. The unreported results for either set of regressions are available upon request.

The results for Repeat Relator likewise confirm the descriptive account presented previously. As Table 9 shows, repeat relators are, all else equal, significantly less likely to win DOJ intervention or impositions. But when they win, they achieve substantially larger impositions than one-shotters. The result is that repeat relators recover $5.4 million more than one-shotters per case filing. Here again, the regression results tend to undermine the view that repeat relators are an obvious drag on the qui tam system.

While the results for the repeat counsel and repeat relator measures confirm the descriptive results presented previously, the results for Former DOJ Insider are more arresting. Holding all other variables (including firm experience) steady, the models imply that relator counsel with prior DOJ experience are roughly 17% more likely to win DOJ intervention and impositions. And yet, when they win, former DOJ insiders achieve impositions that are $10.6 million and $3.4 million *smaller* on a per-win and per-filing basis, respectively, than those achieved by their non-insider counterparts, with both results statistically significant. (The descriptive results presented in Table 6 showed lower per-filing imposition amounts but did not rise to statistical significance.) Thus, the regression results serve to strengthen concern about "revolving door" dynamics, as DOJ allocation of scarce enforcement resources appears to be generating *lower* returns in cases initiated by former DOJ insiders. This plainly calls for further research and even an expanded analysis focusing on the agency-forcing propensities of various qui tam enforcer types, including but not limited to former DOJ insiders, as a way to illuminate critical relationships within the system.

C. *Repeat Play and Returns to Specialization over Time*

The empirical portrait presented so far establishes returns to expertise and specialization, particularly among relator counsel, while at the same time highlighting some possible concerns about clientelism and capture. But none of the results to this point speak to a final, and critically important, question: How, if at all, has the role of expertise and specialization among qui tam enforcers changed over time? Static results of the sort presented above can mask important parts of the story and, moreover, do not permit a judgment about where the regime is headed.

As discussed in Part II, we might expect that the role of expertise and specialization among qui tam enforcers will vary over the life of the regime in either of two distinct ways.[202] First, returns to expertise and specialization may vary over time, either *decreasing* as doctrine and procedures settle or information about the regime's workings disseminates, or *increasing* as specialized qui tam enforcers come to dominate retention and referral networks or develop advantageous relations with public

202. See supra note 63 and accompanying text.

enforcers. Second, and for many of the same reasons, enforcer ranks may become more or less concentrated over time, with top enforcers gaining market share as they consolidate their position or losing market share as new entrants compete away their first-mover advantage. Increasing concentration in particular could be good or bad, generating salutary economies of scale or, in stark contrast, yielding sclerotic enforcement efforts and increasingly clientelistic relations between public and private enforcers.

Figure 3 offers a temporal perspective on qui tam enforcement efforts via a panel of graphs depicting trends in filings and selected litigation outcomes broken out by enforcer type, including relators (two categories: repeat and one-shot) and relator counsel (three categories: firms that filed twenty-five or more cases; firms that filed two to twenty-four cases; and one-shotters).[203] The analysis is limited to 1995 forward because the relatively small number of cases prior to that year makes discerning trends difficult. Even after 1995, the results can be noisy from year to year, and so locally weighted least squares (Lowess) curves are used to smooth the trend lines. The first left- and right-hand pair of panels in Figure 3 captures filing tallies across different types of relators and relator counsel. It shows that repeat relators have accounted for a consistent portion of filings over time.[204] The trendlines for repeat counsel, by contrast, show more movement. Top relator firms have accounted for a growing number of filings since 1995, with one-shotter firms

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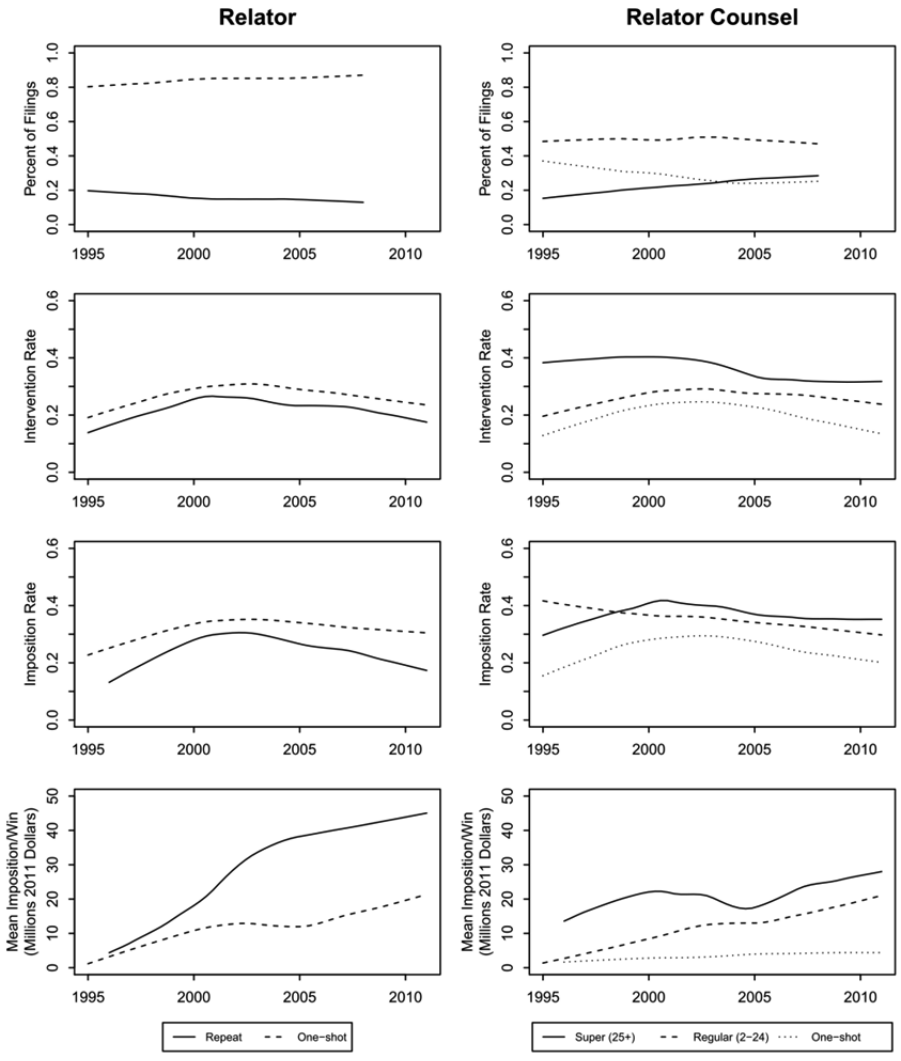
203. Figure 3's panel approach is the cleanest way to gauge trends in the role that specialization and expertise have played within the regime over time. Another sensible way to measure temporal trends would be to use the Herfindahl index (HHI) from antitrust law to measure concentration within enforcer ranks. HHI measures the size of firms in relation to the industry as a whole by summing the squares of the market shares, expressed as fractions, of the fifty largest firms within the industry. The resulting index ranges from zero (denoting an extremely diffuse and competitive market) to one (a single monopolistic producer). However, note that Table 5 previously showed that no single relator firm accounts for more than 3.5% of total qui tam filings over time—with industry leader Phillips & Cohen accounting for roughly 3.5%—thus capping HHI at relatively low levels and making fine-grained judgments about concentration trends difficult. And in fact, performing HHI calculations for filings, interventions, and impositions shows extremely low levels of concentration after roughly 1992.

204. Note that the filing analysis terminates in 2008. The reason is that filing data may be biased by the fact that some cases filed in recent years have not yet generated a DOJ election decision and so remain under seal, reducing the representativeness of the sample. Of particular concern here is the possibility that top (especially "Super") relator counsel win intervention more often, resulting in longer investigation times. For example, we might expect that more of the cases filed in 2010 that have drawn a DOJ election decision (and, in particular, a rapid DOJ declination) will have come from less experienced and, in particular, one-shotter firms. Because there might be similar concerns with regard to the other litigation outcomes in Figure 3 (intervention and imposition rates and imposition dollars)—that is, "Super" firm cases that are overwhelmingly DOJ interventions and on their way to impositions might be under seal if filed more recently in the study period—Figure 3's temporal analysis was rerun constraining the sample to cases filed between 1995 and 2005. The trendlines did not change.

accounting for a declining percentage. This may reflect the fact that many or most plaintiff-side firms have had the occasion to file at least one action, leaving few potential one-shotters left. It may also reflect increasing specialization: With an organized relators' bar touting its success in representing qui tam relators, and with simple internet searches yielding a plethora of firms that maintain a national practice, one-shotters may have diminishing opportunities to retain relator clients.

FIGURE 3: QUI TAM FILINGS AND LITIGATION OUTCOMES OVER TIME BY REPEAT-RELATOR STATUS AND FIRM "TIER," 1995–2011



The remaining panel pairs in Figure 3 turn to three of the main litigation outcomes assessed previously: intervention rates, imposition rates, and per-win mean impositions. The results for repeat relators are straightforward: Repeat relators have suffered lower intervention and imposition rates, and their performance on the former may have dropped somewhat in recent years relative to one-shotters. The trendlines for per-win mean impositions, by contrast, reveal divergence in the other direction, with repeat relators' impositions growing rapidly in size relative to one-shotters. This may once more reflect the work of Ven-A-Care and the rise of other relatively successful "professional" relators from Table 2.

Figure 3's panels depicting trends among relator counsel along the three litigation outcomes are more complicated, but several broad findings stand out. First, "Super" repeat counsel enjoyed large returns to specialization relatively early in the study period. This is denoted by the humps in the "Super" trend line, to varying degrees, that appear in the second, third, and fourth panels. However, the returns to specialization have decreased since then. Thus, while "Super" repeat firms enjoyed a roughly 10–20% advantage over less experienced firms from 1995 to the early 2000s in achieving DOJ intervention, that advantage appears to have decreased with time and now stands at roughly 5%. Overall, the various litigation success measures for repeat counsel show a rough convergence over time. Thus, time may be working against counsel specialization: Case tallies among the most experienced relator-side firms have risen steadily alongside static or even declining intervention and imposition rates.

Why might there be declining returns to specialization among the more experienced relator counsel? It is possible that the set of firms offering relator-side representation with a threshold level of case experience, regular communication channels with public enforcers, or an understanding of the regime's folkways and byways is growing, competing away the specialization advantage of the more experienced firms. To that extent, declining returns to specialization might just be part of the typical lifecycle of a complex litigation regime. But it is also important to emphasize what the trendlines do not show: There is once more no evidence to support the claim that the organized relators' bar does worse than less experienced enforcers or that such counsel might be, as a group, using its position atop referral networks to speculate in qui tam litigation or act as "filing mills," filing cases prematurely or without careful pre-filing inquiry.

Two final trends in evidence are worth noting. First, while the story in the second and third panels of Figure 3 is largely one of convergence among counsel types, the fourth panel reveals an equally pronounced divergence in the fortunes of experienced and one-shotter firms in mean imposition dollar amounts. Second, imposition amounts are clearly on the rise, perhaps driven by a recent spate of very large impositions, many

of them against the pharmaceutical industry, which have been largely captured by experienced firms.[205] Both findings suggest the possibility of a qui tam regime in transition, both in the kinds of cases brought and won and in the distribution of outcomes among enforcers. Future work should consider these issues further via a closer analysis of filing and outcome trends in an effort to understand the possibly changing nature of qui tam litigation.[206]

IV. HARNESSING RECONSIDERED: PRIVATE ENFORCEMENT AND INSTITUTIONAL DESIGN IN THE QUI TAM CONTEXT AND BEYOND

This Article has described and quantified the relationship of enforcer expertise and specialization to qui tam litigation outcomes. This concluding Part steps back and briefly places the main empirical findings in context, sets out some implications for thinking about the institutional design of the FCA and private enforcement regimes more generally, and identifies possible avenues for further research.

A. *FCA Reform Implications*

First, the analysis presented above contributes to legal and policy debates about the FCA itself. Specifically, the finding that enforcer expertise and specialization have been, by and large, a net positive over the life of the post-1986 FCA regime permits rejection of some of the more tendentious claims made by qui tam's critics. "Professional" relators, it seems, are neither supermen nor bogeymen, despite the considerable attention they have received in the popular and academic press. Similarly, while returns to specialization among relator counsel have declined—and the most experienced relator-side firms may be losing their first-mover advantage—the evidence squarely contradicts the claim that the organized relators' bar has engaged in systematic abuses by adopting a "filing mill" strategy. To the contrary, more experienced counsel have consistently outperformed their less experienced counterparts. These are simple points, but they help to clear out a significant amount of underbrush that has too often obstructed and obscured legal and policy debate around the FCA. One reason litigation politics have

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205. Approximately $1.16 billion in 2010 settlements came in three cases involving the pharmaceutical and medical device industries, including $669 million from Pfizer Inc., $302 million from AstraZeneca, and $192.7 million from Novartis Pharmaceutical Corporation. Press Release, Dep't of Justice, Department of Justice Recovers $3 Billion in False Claims Cases in Fiscal Year 2010, http://www.justice.gov/opa/pr/2010/November/10-civ-1335.html (on file with the *Columbia Law Review*) (noting record healthcare fraud civil recoveries of $2.5 billion).

206. See generally David Freeman Engstrom, Private Enforcement's Pathways: Lessons from Qui Tam Litigation (unpublished working paper 2012) [hereinafter Engstrom, Pathways] (on file with the *Columbia Law Review*).

become so dysfunctional in recent decades is a lack of empirical data that can inform public debate.[207]

More concretely, the findings contribute to at least two debates about how, if at all, to amend the FCA. The first debate concerns who should be allowed to sue under the FCA's qui tam provisions in the first place. Of particular note here is the desirability of allowing qui tam suits by "outsider" relators, particularly where the relator's fraud claim derives from information obtained from the government itself. This issue is very much alive—and is, as noted previously, the subject of something of an interbranch tug-of-war. Thus, the Supreme Court's recent *Schindler Elevator* decision effectively precluded such claims under the statute by holding that perfected FOIA requests constitute "public disclosures" under the FCA's jurisdictional bar.[208] Yet even before *Schindler Elevator*, congressional amendments to the FCA had deprived defendants of the ability to challenge a relator's standing on "public disclosure" grounds, instead lodging that authority in the DOJ alone.[209] Assuming the DOJ invokes the FCA's public disclosure bar less vigorously than defendants, the most likely result, despite *Schindler Elevator*'s narrowing statutory interpretation, is a marked uptick in "outsider" claims. To that extent, the insider-outsider debate is likely to continue, and grow even more heated, going forward.

Of course, the above empirical findings cannot resolve deep normative questions raised by FOIA-built fraud claims about whether qui tam enforcement should serve as a complement or counterpoise to public enforcement efforts. Nor are the data used herein sufficiently granular to separate cases derived from FOIA requests from other types of "outsider" investigation, such as private investigative work involving present and former company employees. The above findings do, however, offer empirical purchase on the relative success rates of "outsider" and "insider" relators, establishing that repeat relators—who are almost by definition outsiders—are no less effective than one-shotters, and probably more so, at returning funds to the federal treasury than one-shotters. Thus, the analysis tends to undermine the policy wisdom of the Court's position in *Schindler Elevator* and points in favor of relatively light DOJ scrutiny of a relator's insider or outsider status.

The second concrete FCA reform debate on which the above findings shed light concerns mounting calls to cap relator awards. To this point, much of the debate has revolved around predictions about the impact of caps on the willingness of relators to surface information about

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207. On the dysfunctionalities of public debate about litigation as arising, at least in part, from the illegibility of litigation regimes, see Burke, supra note 6, at 22–35, 45.

208. Schindler Elevator Corp. v. United States ex rel. Kirk, 131 S. Ct. 1885, 1893 (2011).

209. See supra note 18 and accompanying text.

wrongdoing.[210] This raises important and difficult empirical questions regarding the relative mix of moralistic and instrumental motivations underlying relators' decision to sue.[211] The findings presented in this Article offer little direct evidence on that point.[212] However, the analysis *does* suggest that a critically important consideration has gone missing from the caps debate: the impact of capped awards on the structure of the organized relators' bar.

In particular, this Article's finding that more experienced firms bring more successful and larger qui tam cases, when combined with standard economic models of litigation, suggests that policymakers should exercise caution when considering caps as a reform measure. The FCA regime has generated a teeming market for qui tam lawsuits within which various relator-side law firms, each with its own level of attorney skill, regime-specific expertise, and administrative costs (including expensive client intake and screening infrastructures), vie for advantage.[213] The resulting variation across firms also translates into variation in firm opportunity cost structures, with important implications for case sorting.[214] In the presence of a cap on relator awards, firms with higher opportunity costs may not value a marginal qui tam suit highly enough to take it on, instead referring it to firms with lower opportunity

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210. See, e.g., Kesselheim et al., Whistle-Blowers' Experiences, supra note 83, at 1838 (noting relator recoveries "appear[] to be quite disproportionate (in both positive and negative directions) to the whistle-blower's personal investment in the case" and advocating "[m]ore sophisticated approaches to determining relators' recoveries"); Loucks, supra note 5, at 103–04 (analyzing potential effect of caps and concluding caps would not deter relators from whistleblowing).

211. See generally Elletta Sangrey Callahan & Terry Morehead Dworkin, Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act, 37 Vill. L. Rev. 273 (1992) (reviewing literature); Marsha J. Ferziger & Daniel G. Currell, Snitching for Dollars: The Economics and Public Policy of Federal Civil Bounty Programs, 1999 U. Ill. L. Rev. 1141 (same).

212. A possible exception derives from the finding that repeat relators and organizational outsiders initiate a large proportion of qui tam litigation and, on a per-win basis, achieve larger impositions than traditional, one-shot insiders. It seems reasonable to assume that outsider relators—and maybe also repeat relators, to the extent repeat status proxies for outsider status—are more instrumentally motivated than insiders. This suggests that caps should also have a greater impact on the propensity of repeat and outsider relators to sue compared to insiders. If this is true, then caps could move the regime toward an insider-driven whistleblower regime, yielding relatively more successful enforcement efforts but potentially smaller impositions.

213. See Interview with Relator Counsel, supra note 136 (describing substantial client intake operations for receiving and screening cases); see also Kreindler, supra note 137 ("Unlike other contingent fee practices . . . qui tam is unlikely to ever become a high volume practice. Combine that with the fact that most qui tam cases take three to five years to resolve and it is clear that picking viable cases is the lifeblood of a successful qui tam practice."). On plaintiff-side case "screening" more generally, see supra note 46.

214. The discussion that follows draws heavily from Christine Piette Durrance, Noneconomic Damage Caps and Medical Malpractice Claim Frequency: A Policy Endogeneity Approach, 26 J.L. Econ. & Org. 569, 589 (2009).

costs. Alternatively, a spurned relator may, after rejection by a top-level practitioner, continue to search on her own, working her way down the food chain until she finds counsel willing to take her case.

Viewed from this perspective, the likely consequences of caps are twofold. First, caps may, by lowering the marginal return on cases, produce a redistribution of qui tam suits from more experienced and more skilled (i.e., higher opportunity cost) firms to less experienced and less skilled (i.e., lower opportunity cost) firms. Second, and relatedly, caps may induce higher opportunity cost firms to select away from qui tam representations altogether in search of more attractive litigation vistas. Both dynamics may depress the overall level of specialization and experience of relator-side counsel who pilot qui tam cases within the system. Importantly, if litigation opportunities are merely shifted down the counsel food chain, and if most relators are still able to obtain willing counsel, the erosion of enforcement quality may come without any substantial change in filing volume. In the end, caps may do little to constrict the supply of qui tam litigation and may have other, potentially perverse effects on the enforcement landscape.

To be sure, this analysis is by no means the last word in either of the above debates. On the caps debate in particular, it is noteworthy that returns to relator-counsel specialization have declined over time. Since enforcement markets have thickened and enforcement expertise has dispersed, caps may have fewer deleterious effects than they might have had earlier in the life of the post-1986 FCA regime. More generally, highly specialized enforcement capacity might be less important in fully mature private enforcement regimes once a larger proportion of firms achieve a threshold level of enforcement expertise. Future research might consider in a more systematic way these and other possible theories about the likely effect of caps on the structure of the organized relators' bar over time.

There are other reasons for caution in drawing policy conclusions from the above analysis. First, as repeatedly noted above, the empirical analysis presented in this Article necessarily abstracts from causal mechanisms. Second, recall that an important part of the supply-side critique centers on the *types* of claims brought by more specialized enforcers, whether repeat relators or specialized counsel, rather than their volume or success. More granular analysis may help policymakers to understand, for instance, whether certain qui tam enforcers—repeat relators, more experienced relator counsel, or other types entirely—have a greater propensity to initiate so-called "certification" or other FCA claims that some have argued should be disfavored.[215] Finally, it is important to note that specialization may yield other, separate pathologies. Future research

215. See supra notes 144–146 and accompanying text (discussing critics' disapproval of "certification" claims and possible role of specialized qui tam lawyers in developing such claims).

should probe the capture and clientelism concerns suggested by the curiously strong performance of former DOJ insiders within the qui tam regime. In particular, one could compare the relative propensity of different enforcer types to litigate and win qui tam cases where the DOJ has declined to intervene.[216]

B. *Beyond Qui Tam: What We Know and Where We Go*

A second and broader set of implications sweeps well beyond the qui tam context and suggests new theoretical and empirical avenues for thinking about the design of private enforcement regimes that take better account of the on-the-ground challenges facing legislators who deploy private litigation as a regulatory tool. Some of these challenges have been thoroughly discussed, both above and elsewhere. For instance, the private incentive to litigate is different from the social incentive, creating the risk of a gold rush of socially inefficient enforcement effort.[217] Moreover, legislative mechanisms of control that might curb these tendencies are blunt. As just one example, simple procedural barriers or caps on recoveries can have undesirable distributive impacts between claimant types or risk screening out good claims with bad.[218]

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216. A broader set of implications concerns proliferating calls to export the FCA's qui tam and agency oversight mechanisms to other regulatory areas. See, e.g., Janet Cooper Alexander, Rethinking Damages in Securities Class Actions, 48 Stan. L. Rev. 1487, 1517–18 (1996) (proposing expansion to securities litigation); Bucy, Private Justice, supra note 3, at 76–77 (securities and environmental protection); Fisch, supra note 3, at 198–202 (securities and antitrust); Myriam E. Gilles, Reinventing Structural Reform Litigation: Deputizing Private Citizens in the Enforcement of Civil Rights, 100 Colum. L. Rev. 1384, 1388 (2000) (civil rights); Aaron R. Petty, How Qui Tam Actions Could Fight Public Corruption, 39 U. Mich. J.L. Reform 851, 852 (2006) (public corruption); Geoffrey Christopher Rapp, False Claims, Not Securities Fraud: Towards Corporate Governance by Whistleblowers, 15 Nexus: Chapman's J.L. & Soc. Pol'y 55, 59 (2009) (securities); Amanda M. Rose, Reforming Securities Litigation Reform: Restructuring the Relationship Between Public and Private Enforcement of Rule 10B-5, 108 Colum. L. Rev. 1301, 1349 (2008) (securities); Heidi Mandanis Schooner, Private Enforcement of Systemic Risk Regulation, 43 Creighton L. Rev. 993, 1012 (2010) (securities and financial regulation); Thompson, Jr., supra note 3, at 230–33 (environmental protection); Dennis J. Ventry, Jr., Whistleblowers and Qui Tam for Tax, 61 Tax Law. 357, 359 (2008) (tax); Jennifer Arlen, Public Versus Private Enforcement of Securities Fraud, Presentation to Conference on Enforcement of Corporate Governance at Harvard Law School 47 (2007) (on file with the *Columbia Law Review*) (securities). Applying the empirical findings presented in this Article to such calls raises complicated issues, including the usual questions of generalizeability, that are taken up more fully in Engstrom, Public Regulation of Private Enforcement, supra note 22.

217. See supra notes 30–31 and accompanying text (explaining profit-driven relators will act whenever it is in their own economic interests regardless of economic and social costs incurred by society and noting that this may result in plaintiffs "threaten[ing] . . . massive discovery costs or bad publicity to extract settlements" in cases where social costs of adjudication outweigh societal benefit).

218. See supra notes 38–39 and accompanying text (exploring effects of payout reductions and procedural barriers).

Yet a critically important part of the legislative challenge is informational and stems from both the opacity of decentralized litigation regimes and, as noted previously, the fact that private enforcers are often heterogeneous in their motives and means.[219] Here, then, is one place where legal scholars working across a range of litigation contexts can add value by deploying some of the tools used above to better understand the enforcement proclivities and capacities of particular enforcer types. More and better study across litigation areas will also permit generalizeable insights about how particular lawyer and litigant characteristics, among them specialization and expertise, interact with other features of the litigation environment, such as the degree of technicality of the regulatory area or the presence or absence of agency oversight of the sort excercised by the DOJ under the FCA. Empirical research of the sort presented in this Article can thus arm policymakers with at least some of the information necessary to optimize private enforcement efforts or, alternatively, to make better decisions about whether to deploy private enforcement as a regulatory tool at all.

Mapping the qui tam enforcement landscape over time and focusing on the role of expertise and specialization, particularly among counsel, further suggests that legal scholars might also consider how legislators can better induce desired levels of investment in private enforcement capacity. Indeed, legislators who use private enforcement to regulate undesirable behavior must induce private enforcers, particularly law firms, to make substantial regime-specific investments, such as substantive legal expertise and an infrastructure for identifying enforcement opportunities and retaining clients, if they wish to move the dial in deterrence terms.[220] And yet, basic precepts of deterrence theory predict that well-incentivized private enforcers will, to at least some extent, secure their own obsolescence as regulatory targets adapt to a higher risk of detection and punishment.[221] From an ex ante regulatory design perspective, the result is a type of exchange problem: Private enforcers will invest in enforcement expertise and infrastructure only if legislators

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219. See supra note 40 and accompanying text (discussing difficulties of tailoring payouts to achieve optimal enforcement and presenting overdeterrence of antitrust litigation as example).

220. See, e.g., Brodley, supra note 22, at 26 (1995) ("Effective private . . . enforcement depends on plaintiffs who have the financial resources, knowledge of the industry, legal sophistication, and motivation to mount a powerful case with speed and precision.").

221. See Wendy Naysnerski & Tom Tietenberg, Private Enforcement of Federal Environmental Law, 68 Land Econ. 28, 43 (1992) ("[T]he rise of private enforcement increases the likelihood that violations will be detected and prosecuted, [and] should increase the observed degree of compliance with the regulations. As the degree of compliance increases, the benefits from litigation activity decrease."). See generally Margaret H. Lemos & Alex Stein, Strategic Enforcement, 95 Minn. L. Rev. 9 (2010) (providing general treatment of deterrence theory in law enforcement context).

can credibly assure sufficient return on any such investment going forward.

This problem is by no means insoluble. For example, legislators can increase payouts on the front end to achieve desired investment in enforcement capacity by setting bounties at a level that reflects the blended return on investment over time as enforcement opportunities wither. Higher payouts during an initial enforcement time period will thereby offset lower expected payouts during subsequent time periods. Alternatively, legislators can enact broad legal mandates that provide private enforcers with continuing opportunities to recoup investments beyond an initial set of statutory applications. The FCA may provide an example of this approach. Faced with particular concern about defense procurement fraud throughout the first half of the 1980s, Congress chose to revive the FCA, a broad and open-textured prohibition against fraud in connection with virtually *all* federal programs and expenditures. In doing so, Congress promised a future stream of statutory applications and enforcement opportunities beyond the defense procurement area.

But both approaches entail substantial costs. Most obviously, raising payouts risks incentivizing enforcement efforts that are not justified in terms of social cost, as private enforcers who have not invested in regime-specific expertise or infrastructure—but nonetheless identify enforcement opportunities—initiate litigation in pursuit of outsized bounties. In other words, dutiful investors and non-investors alike will reap the rewards of generous payout schedules designed to incentivize investment in enforcement capacity. As a result, legislators cannot incentivize construction of private enforcement capacity through increased payouts without creating a possible gold rush and over-entry.

Enactment of deliberately vague legal mandates as a way to induce private investment in enforcement capacity creates different, but no less significant, problems. As payouts in an initial set of statutory applications fall away, new applications will become comparatively attractive. The result will be mission creep and regulatory drift as profit-seeking private enforcers shift resources to the development and pursuit of novel uses, driving legal mandates in new and potentially democratically unaccountable directions. This is exacerbated by the relentless competitive pressures facing private enforcers in fully mature enforcement markets, as evidenced by Part III.C's temporal view of the qui tam enforcement landscape. Here, the institutional design challenge resembles a standard delegation problem, long studied by administrative law scholars but rarely raised in the context of private enforcement as a regulatory tool.[222] A legislator who opts to use statutory ambiguity as a way to induce private

222. For a classic statement of the trade-offs between agent control and context-sensitive implementation in the administrative law context, see generally Jerry L. Mashaw, Prodelegation: Why Administrators Should Make Political Decisions, 1 J.L. Econ. & Org. 81 (1985).

enforcers to invest in enforcement capacity risks sacrificing a measure of democratic control over the elaboration of legal mandates.[223]

Two implications follow. First, legal scholars should think hard about alternative tools that legislators might use to shape the level of enforcer specialization and expertise, particularly among counsel. For instance, while some commentators downplay attorney fee shifts as a way to incentivize enforcement activity,[224] appropriately structured fee provisions might nonetheless create incentives for specialization. In the current system, incentives for specialization may be implicit, as when judges reward claims to expertise in calculating lodestar awards.[225] But legislators could also make them explicit, by prescribing a fee schedule granting higher fee awards to firms with provable expertise or specialization. Further research might consider the legal and policy implications of still other alternatives, such as creating a licensing system in which private enforcers, whether plaintiffs or plaintiff-side firms, purchase a "hunting license" in order to be statutorily eligible to initiate enforcement efforts.

Second, understanding private enforcement in the above terms places the overheated claims about the qui tam regime with which this Article began on a sounder theoretical footing. Indeed, claims about the virtues and vices of private enforcement—claims that echo across a range of regulatory regimes that deploy private litigation as a policy tool—cannot be understood solely by reference to the actions of decentralized, profit-motivated litigants. Rather, the challenges of deploying private enforcement as a regulatory tool begin well upstream and are endemic to delegation itself. This Article's detailed portrait of the qui tam enforcement landscape thus offers a starting point for renewed thinking about the possibilities and limits of private enforcement of public law in the FCA context and beyond.

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223. See Engstrom, Pathways, supra note 206, at 5, 16–17.

224. See, e.g., Farhang, Mobilization, supra note 29, at 30–31 (noting relative inefficacy of fee shifts as possible explanation for disparate empirical findings that Civil Rights Attorney's Fees Award Act of 1976 did not appear to boost volume of constitutional tort filings but heightened-damages provisions of Civil Rights Act of 1991 did); Lemos, supra note 29, at 809 (reviewing empirical studies and concluding that damages enhancements may be relatively more effective at mobilizing private enforcers than fee shifts).

225. See, e.g., Blum v. Stenson, 465 U.S. 886, 898 (1984) (stating reasonable hourly rate should take account of "the special skill and experience of counsel").